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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Chrysler Corporation respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a-42a) is not yet officially reported. The opinion of the district court (App. B, *infra,* pp. 43a-57a) is reported at 412 F.Supp. 171.

JURISDICTION

The judgment of the court of appeals (App. C, *infra,* pp. 58a-59a) was entered on September 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), mandates that private, confidential information which falls within that exemption not be publicly disclosed.

2. Whether agency regulations promulgated pursuant to 5 U.S.C. § 301 constitute "authorization by law" within the meaning of 18 U.S.C. § 1905 for disclosure of private, confidential business information.

3. Whether a person who has supplied to a government agency private, confidential information which assertedly is exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), or whose disclosure assertedly would violate 18 U.S.C. § 1905, is entitled to a trial *de novo* in a suit to prevent disclosure of that information by the Government.

STATUTES AND REGULATIONS

The relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552, as amended, 18 U.S.C. § 1905, 5 U.S.C. § 301, and the pertinent regulations of the Office of Federal Contract Compliance Programs, 41 C.F.R. Part 60-40, are set forth as App. D, *infra,* pp. 62a-65a.

STATEMENT OF THE CASE [1]

1. As a government contractor, Chrysler Corporation ("Petitioner") is required to comply with Executive Orders 11246 and 11375 [2] ("Executive Orders") and with various implementing regulations [3] which have been promulgated thereunder by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). These orders and regulations require Petitioner and other government contractors to, *inter alia,* prepare and submit to Respondents [4] a variety of reports and information, including written affirmative action programs ("AAP's") and equal employment opportunity reports ("EEO-1's"), for its entire corporate domestic operations and separately for each of its individual domestic facilities.

[1] The statement of facts, which are not in dispute, is based on the opinion of the court below and the joint appendix in the court of appeals.

[2] 30 Fed. Reg. 12319, 32 Fed. Reg. 14303 (1967), 3 C.F.R. 169-177 (1974).

[3] 41 C.F.R. Parts 60-1, 60-2 and 60-60.

[4] Respondents are Harold Brown, Secretary of Defense; Lt. Gen. W. W. Vaughan, Commander of the Defense Logistics Agency (formerly, Defense Supply Agency) of the Department of Defense ("DSA"); F. Ray Marshall, Secretary of Labor; and Weldon J. Rougeau, Director of OFCCP. The Secretary of Labor is responsible for administering the equal employment opportunity program established by the Executive Orders. Executive Order 11246, Sec. 201. The Secretary discharges his responsibilities through OFCCP and has designated the Defense Supply Agency as one of the several "compliance agencies" responsible for monitoring government contractors' compliance with the Executive Orders, investigating charges made against contractors, and imposing sanctions upon contractors who do not comply with the Executive Orders. See Executive Order 11246, Subpart C; 41 C.F.R. §§ 60-1.2, 60-1.6; OFCCP Compliance Manual, § 2-202.

Under the Executive Orders and OFCCP's regulations, Petitioner is required to include in each of the nearly one hundred AAP's which it prepares annually highly detailed information of both a statistical and narrative nature concerning its total, and minority and female, employment for each department and subdepartment which exists at the particular facility and, within each such department, for each job classification. Such information includes, *inter alia,* data on staffing patterns, pay-scales, actual and expected shifts in employment and related employment matters; goals, timetables and future projections for the employment of minorities and females; and critical self-analyses where Petitioner believes it has not met its obligations under the Orders and regulations. 41 C.F.R. §§ 60-1.40, 2.11 and 2.12. The AAP's specifically at issue below were, respectively, 175 and 257 pages in length.

The EEO-1 reports which Petitioner is also required to furnish to Respondents are prepared on the Government's Standard Form 100. The EEO-1's contain statistical information with respect to the total number, and the number of minority and female, persons employed by Petitioner in nine specified job categories.

To enforce the Executive Orders, Respondents conduct "compliance reviews" and "complaint investigations" to determine whether a contractor is in compliance with, or in violation of, the Orders and OFCCP's regulations. At the conclusion of these reviews and investigations, Respondents prepare either a "compliance review report" ("CRR") or "complaint

investigation report" ("CIR") which describes and discusses the documents and information submitted to Respondents by the contractor, analyzes the contractor in light of the Orders and regulations, and recommends corrective measures which the contractor should be required to implement. The reports may incorporate, in whole or in part, AAP's, EEO-1's or supporting documents.

The Secretary of Labor has promulgated regulations providing for public disclosure of information from records of OFCCP and its compliance agencies. 41 C.F.R. Part 60-40. (App. D. *infra,* pp. 62a-65a). The regulations provide generally that "[u]pon the request of any person * * * records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure [under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552], if it is determined that the requested inspection and copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law." 41 C.F.R. § 60-40.2(a). In addition, the regulations specifically provide that, upon request, "* * * [EEO-1 reports] which [are] submitted by contractors to the OFCC[P] [or] a compliance agency * * * shall be disclosed" (41 C.F.R. § 60-40.4) and that affirmative action programs, subject to limited exceptions (41 C.F.R. § 60-40.3), "must be disclosed." 41 C.F.R. § 60-40.2(b)(1).

2. This action arose when DSA notified Petitioner that DSA had received requests under the FOIA [5] for

[5] The FOIA requires agencies to disclose upon request any docu-

disclosure of affirmative action programs, EEO-1 reports, CRR's and CIR's for two of Petitioner's facilities. To the extent posible within the brief ten-day period allowed by Respondents, Petitioner objected to the proposed disclosure of the documents asserting, *inter alia,* that the AAP's and EEO-1's were exempt from disclosure under exemptions to the Freedom of Information Act and under OFCCP's rules, and that disclosure would violate 18 U.S.C. § 1905.[6]

Thereafter, DSA notified Petitioner that Respondents had determined that the documents at issue were subject to disclosure virtually in their entirety; and that Petitioner would not be furnished with a copy of the CIR or CRR prior to disclosure. In addition, Respondents stated that, because they were required by the FOIA to make a substantive decision on release of these documents within ten working days of receipt of the request, they would not await the result of any administrative appeal by Petitioner of Respondents' disclosure decision under the provisions of 41 C.F.R. § 60-60.4(d).

Faced with the threatened release of the documents, Petitioner commenced this action seeking to enjoin Respondents from publicly disclosing the documents and further seeking a declaratory judgment that the public disclosure by Respondents of any other such

ment in their files unless the document falls within one of nine specifically exempted categories. See App. D, *infra,* p. 60a.

[6] Petitioner also requested that Respondents furnish Petitioner with copies of the CRR and CIR which Respondents proposed to release—which Petitioner had never seen—so that Petitioner might be able to determine what parts of the reports were confidential and to intelligently present its claim of confidentiality.

documents for any of Petitioner's facilities was contrary to, *inter alia,* Exemptions 3 and 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3) and (4), and 18 U.S.C. § 1905. The district court conducted a trial *de novo* during which both Petitioner and Respondents presented the testimony of expert witnesses and others relating to the nature of information contained in the contested documents, the uses to which such information could be put by competitors of Petitioner, and the adverse consequences which would be caused by disclosure.

On April 20, 1976, the district court issued its opinion. Appendix B, *infra,* pp. 43a-57a. The district court held that it had subject matter jurisdiction under 28 U.S.C. § 1331(a); that portions of the documents consisted of confidential commercial information whose disclosure would cause substantial competitive injury to Petitioner;[7] that such information is exempt from mandatory disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4); and that disclosure of that information would violate 18 U.S.C. § 1905 and 29 C.F.R. § 70.21(a). On this basis, the district court concluded that disclosure of those portions of the AAP's was contrary to law and should be

[7] The district court found that "the testimony clearly shows that the manning tables are confidential • • • [and that] the release of the manning tables could cause Plaintiff substantial competitive harm in several ways. First, the possession of such a document could aid another corporation in its practice of employee raiding, a practice not unknown in the automobile industry. • • • Second, the possession of a manning table would permit a competitor to determine the exact use of Plaintiff's labor force, and thus the technology being applied by Plaintiff • • • [which information] would be useful in comparative analysis and would alert competitors to areas worth their managerial time. • • • Third, the possession of manning tables . . . would allow Plaintiff's competitors to reduce their risk-taking." App. B, *infra,* p. 51a.

enjoined pursuant to 5 U.S.C. § 706(2)(A). The court concluded, however, that other portions of the documents were not immune from public disclosure, and rejected Petitioner's request for declaratory relief. A supplemental memorandum and final order were filed on June 17, 1976. App. E, *infra,* pp. 66a-67a.

On cross-appeals by the parties the court of appeals reversed. App. A, *infra,* pp. 1a-42a. The court held, *inter alia,* that a cause of action to enjoin disclosure of documents which assertedly will violate FOIA Exemption 4 and 18 U.S.C. § 1905 exists only under § 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and that none can be implied under Exemption 4 or § 1905. The court also held that government agencies have discretion to disclose confidential, private documents notwithstanding the fact that the documents fall within an FOIA exemption, and that disclosure of information pursuant to agency regulations promulgated under 5 U.S.C. § 301 was "authorized by law" within the meaning of 18 U.S.C. § 1905. Finally, the court held that an action to enjoin disclosure of documents was not to be conducted on a *de novo* basis, as the district court had, but rather that review should be limited to only a determination, on the basis of the agency record, of whether the agency's decision to disclose was arbitrary, capricious or an abuse of discretion. Finding that the agency record was inadequate, the court remanded the case with instructions that further proceedings be conducted before the agency.

REASONS FOR GRANTING THE PETITION

Businesses such as Petitioner are asked or compelled to submit vast amounts of confidential, proprietary in-

formation to federal government agencies on a continuing basis. In the hands of the Government, this information enables federal agencies to effectively monitor the economy and to determine industry's compliance with diverse regulatory programs. Indiscriminately released, the same information can reveal intimate aspects of a company's operations and can result in severe competitive or other injury to the business. Consequently, many, if not most, businesses take careful precautions designed to guard against the release of such information and, apart from submission to the Government for limited regulatory purposes, generally do not publicly disclose much of the information which they furnish to federal agencies.

Traditionally, the confidentiality of such private business information has been respected by the Government. However, under recent interpretations of the Freedom of Information Act, the tables of business privacy have turned to the point where, today, businesses which submit confidential information to government agencies have no assurance that the confidentiality of that information will be respected. This result neither was intended nor is appropriate under the Act.

Although the FOIA was intended to open the processes of government to public scrutiny,[5] Congress sought to balance the Act's disclosure philosophy with the "equally important rights of privacy with respect to certain information in government files."[6] While

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[5] S.Rep.No. 813, 89th Cong., 1st Sess. 3 (1965) ("S.Rep.No. 813"); H.Rep.No. 1497, 89th Cong., 2d Sess., 12 (1966). *See* Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C.Cir.), *cert. denied,* 400 U.S. 824 (1970).

[6] S.Rep.No. 813, at 3.

each of the exemptions to the Act reflects this concern over rights of privacy to a varying degree, it was of particular significance to Congress in fashioning Exemption 4. Similarly, in enacting Exemption 3, Congress was specifically concerned with preserving the protection which previously had been afforded to confidential information through preexisting nondisclosure statutes.[10] Unfortunately, since 1965, courts have experienced increasing difficulty in accommodating these competing interests and aims of the Act.

The instant case is representative of a rapidly growing number of "reverse FOIA" actions which have been brought by private parties to enjoin federal government agencies from disclosing, pursuant to the Freedom of Information Act, confidential information which those parties have furnished to the Government. As the court below recognized,

> "[t]he case presents several important issues about agency management of [confidential] . . . information, about agency discretion to disclose information . . . and about the availability of remedies for the prevention of disclosure." App. A, *infra*, p. 21a.

These issues are of broad public significance since they affect the disclosability not only of employment information provided to the Government by tens of thousands of government contractors such as Petitioner, but also of an endless array of other commercial and financial materials of a confidential nature which businesses and individuals are asked or compelled to submit to the many hundreds of federal government agencies which are subject to the FOIA. Those materials,

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[10] FAA Administrator v. Robertson, 422 U.S. 255, 263-5 (1975).

although long maintained in well deserved confidence by the Government, now are, under the construction of the FOIA urged by the Respondents and endorsed by the court below, threatened to be disclosed to anyone from the well intentioned member of the public to the unscrupulous competitor. Such disclosure portends serious adverse consequences not only to the persons who have furnished the information to the Government, but also to the Government itself whose ability to acquire information on a voluntary basis from the private sector for implementation of regulatory programs will be impaired if the confidentiality with which the information was initially submitted is not respected.[11]

While this Court has previously reviewed FOIA cases involving conflicts between administrative agencies and parties seeking disclosure of documents,[12] the Court has as of yet declined to address the equally important clash between those interests and the right of businesses and other persons to continued confidentiality of information which they submit to federal agencies. Although questions similar to those presented by this case were brought before this Court on at least three occasions during the last term, certiorari was denied in each instance.[13]

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[11] *See*, Dickerson v. United States Steel Corp., 12 E.P.D. § 11095 (E.D.Pa. 1976); Sanday v. Carnegie-Mellon University, 12 FEP Cases 101 (W.D.Pa. 1975).

[12] See, *e.g.*, Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); FAA Administrator v. Robertson, *supra;* Sears, Roebuck and Co. v. NLRB, 421 U.S. 132 (1975).

[13] Brown v. Westinghouse Electric Corp., No. 76-1192, *cert. denied*, —— U.S. ——, 53 L.Ed.2d 239 (1977); The Prudential Insurance Company of America v. National Organization for Women, No. 76-1052, *cert. denied*, —— U.S. ——, 53 L.Ed.2d 238 (1977);

The time for review of these issues by this Court is now at hand. The opinion of the court below is diametrically contrary to the decisions of either the Fourth or District of Columbia Circuit on each of the fundamental reverse FOIA issues presented by this petition.[14] Due to the uncertainty caused by these conflicting circuit court decisions,[15] persons who must decide whether to furnish confidential information to federal agencies have no means of knowing whether the confidentiality of such information will be preserved, or whether the information will be disclosed under the FOIA; agencies and their employees have no certain standards by which to make disclosure decisions;[16]

Sears, Roebuck and Co. v. GSA, No. 76-1642, *cert. denied*, —— U.S. ——, 54 L.Ed.2d 84 (1977).

[14] Thus, in contrast to those cases in which certiorari was denied (see n. 13, *supra*), there is no longer a need for further development of the law at the circuit court level.

[15] Disagreement exists not only among, but even *within*, the circuits on some of the issues presented by this petition. *Compare, e.g.*, Crown Central Petroleum Corp. v. Kleppe, 14 FEP Cases 49 (D.Md. 1976), *with* Westinghouse Electric Corp. v. Schlesinger, *supra*.

[16] Agency employees who must make disclosure decisions are faced, on the one hand, with the criminal sanctions of 18 U.S.C. § 1905 should they erroneously decide to disclose information and, on the other hand, with the contempt sanctions of 5 U.S.C. § 552(a)(4)(G) should they mistakenly refuse to disclose information in response to an FOIA request. Moreover, agency officials have been directed by some courts to perform what other courts hold to be criminal acts. While decision makers will always face some uncertainty as to the correctness of their decisions, the conflicting circuit court decisions, compounded by the liberal venue rules which govern the choice of the circuit within which such decisions will be reviewed, make for a chaotic environment in which reasoned decision making by government officials on disputed disclosure requests may be well nigh impossible.

and federal courts are left aimlessly adrift in deciding not only the substantive issues of reverse FOIA cases but, also, even in determining fundamental matters such as the proper scope of judicial inquiry in an action to enjoin disclosure. Absent guidance by this Court, which has been expressly requested by some courts[17] and which is obviously needed by others,[18] courts and federal agencies alike will be forced to continue to resolve sensitive disclosure questions on the basis of the diametrically contrary judicial precedent which now exists.

For these reasons, and those presented below, Petitioner submits that certiorari should be granted.[19]

1. Respondents asserted below that they had discretion to disclose Petitioner's documents notwithstanding the district court's finding that the documents fell within Exemption 4 of the FOIA[20] because they

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[17] See, *e.g.*, Sears, Roebuck and Co. v. GSA, 553 F.2d 1378, 1385 (D.C.Cir. 1977), where the D.C. Circuit expressly noted the absence of, and need for, "decisive new guidance by the Supreme Court" on some of the very same questions which are presented by this petition.

[18] The uncertainty surrounding these issues is reflected by the action of the U.S. Court of Appeals for the Ninth Circuit in *Hughes Aircraft* v. *Schlesinger*, No. 75-1064, a case involving many of the same issues that are presented here. There, on April 14, 1977, one year after oral argument, the Ninth Circuit withdrew the case from submission pending action by this Court on the petitions filed in *Westinghouse* and *Prudential*. Despite this Court's denial of certiorari in those cases in May 1977, the *Hughes* case remains undecided.

[19] *See* Rule 19(b) of the Rules of the Supreme Court; and Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 559 (1968).

[20] Exemption 4 provides that the disclosure mandate of the FOIA "does not apply to matters that are . . . commercial or financial

were confidential and would cause substantial competitive injury to Petitioner if disclosed.[21]

The court below adopted Respondents' position in deciding this case. Although it recognized that, in enacting the FOIA, Congress was concerned that "disclosure of certain information might injure interests in privacy and confidentiality which may be as important as the public's right to general access to agency information," the court nonetheless rejected the notion that "Congress in the FOIA intended . . . that the exemptions make nondisclosure mandatory . . ." and held that government agencies have broad discretion to disclose exempt information. App. A, *infra,* pp. 23a-25a. Two other circuit courts have reached a similar conclusion.[22]

As the court of appeals observed (App. A, *infra,* p. 23a), its holding is contrary to that of the Fourth Circuit in *Westinghouse Electric Corp. v. Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Electric Corp., supra.*[23] There, the Fourth Circuit observed that

> "[t]he protection from disclosure given such information by Exemption 4 was stated in the legislative hearings to have been granted to such in-

information obtained from a person and privileged or confidential . . ." 5 U.S.C. § 552(b)(4); see App. D. infra, p. 61a.

[21] See n. 7, *supra.* This finding was not challenged by Respondents on appeal.

[22] Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C.Cir. 1975); Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976).

[23] *See also* McCoy v. Weinberger, 386 F.Supp. 504 (W.D.Ky. 1974); Neal-Cooper Grain Company v. Kissinger, 385 F.Supp. 769 (D.D.C. 1974).

> formation 'not only as a matter of fairness, but as a matter of right . . .' * * * [T]he Act was intended, to use the language of the Senate report, to set 'up workable standards for what records should and should *not* be open to public inspection.' And one of the sections of the Act, which declared what private information acquired by the government 'should *not* be open to public disclosure' was Exemption 4. * * * This provision in the Act was more than a simple exemption; it represented an express affirmation of a legislative policy favoring confidentiality of private information furnished government agencies, the disclosure of which might be harmful to *private* interests. It was manifestly intended to protect that private interest." 542 F.2d at 1211 (footnotes omitted) (emphasis in original).

On this basis, the court concluded that Exemption 4 confers upon a supplier of private, confidential commercial information the *right* to prevent the disclosure of information which falls within Exemption 4.

There is a fundamental conflict between the decision of the court below (and those of the Fifth and D.C. Circuits), on the one hand, and that of the Fourth Circuit, on the other, which this Court should resolve. That conflict can be resolved by recognizing the inherent difference between those FOIA exemptions which obviously were intended to protect *agencies* from mandatory disclosure of agency information (e.g., Exemptions 1 and 5), and those exemptions which clearly were fashioned to protect *private,* nongovernmental interests (e.g., Exemptions 4 and 6). While the Government should and does have the power to waive the protection from mandatory disclosure of agency information afforded by the first

category of exemptions, the agency does not and should not have the power to waive the protection which Congress intended to bestow on private parties through the second. For, although Congress intended that disclosure of *agency* documents which fall within the FOIA exemptions would ordinarily be within the agency's discretion, it intended to accord greater protection to *private* confidential information which *private* individuals and businesses furnish to the Government, the disclosure of which would be harmful to *private* interests.[24]

Petitioner submits that only by recognizing the distinction drawn by Congress between *private* and *agency* records can the FOIA's basic disclosure policy *and* the equally important congressional policy underlying the exemptions *both* be given their intended effect. The Fourth Circuit, in contrast to the decisions of the court below [25] and the D.C. and Fifth Circuits,

[24] The FOIA "was *not* enacted for the purpose of enabling the public to obtain information about *individuals* and *corporations*, about what those individuals or corporations are doing, or about what their activities and policies are • • •;" rather, "[t]he purpose of the . . . Act was to protect the people's right to obtain information about their *government*, to know what their government is doing, and to obtain information about government activities and policies." Westinghouse Electric Corp. v. Schlesinger, 542 F.2d at 1210 n. 64 (emphasis added). Curiously, however, most of the documents whose threatened disclosure has given rise to reverse FOIA actions have concerned the actions, plans and policies of *private* parties, not those of the *government*, and have been sought either by corporations or their agents seeking information about their competitors or by parties in litigation who seek to bypass the Federal Rules of Civil Procedure. See Lardner, *Use, Abuse of Freedom of Information Act*, Washington Post, July 27, 1976, at A 4.

[25] In fact, the court below conceded "that disclosure of submitter information is qualitatively different from disclosure of data directly relating to government operations, and that the interest in privacy

correctly drew this distinction in holding that, regardless of the Government's discretion to disclose exempt *agency* documents, Exemption 4 mandates that *private* documents which fall within the exemption not be disclosed.

2. Section 1905 of Title 18 of the U.S. Code is a criminal statute which makes it unlawful for any government official or employee, "to any extent not authorized by law", to disclose information which concerns or relates "to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any . . . corporation . . ." [26] App. D, *infra*, p. 61a.

The court below held that 5 U.S.C. § 301 [27]

> "is a separate source of agency authority for the promulgation of disclosure regulations, and disclosures pursuant to such regulations are author-

appears stronger with respect to the former than the latter." App. A, *infra*, p. 22a. Yet, the court paid little heed to this qualitative difference in ruling that Respondents may disclose private information which falls within Exemption 4.

[26] Numerous federal courts have held that an agency may be enjoined from disclosing information in violation of 18 U.S.C. § 1905. See, *e.g.*, Westinghouse Electric Corp. v. Schlesinger, *supra*; General Dynamics Corp. v. Dunlop, 427 F.Supp. 578 (E.D.Mo. 1976), *appeal pending*, No. 77-1192 (8th Cir.); Charles River Park "A", Inc. v. HUD, *supra*.

[27] See App. D, *infra*, pp. 61a-62a. 5 U.S.C. § 301 provides in pertinent part:

> "The head of an executive department or military department may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

ized by law and immune from the prohibitions of § 1905. Since the OFCC[P] disclosure regulations are valid under § 301, all disclosures pursuant to those regulations are authorized by law and therefore not subject to § 1905." App. A, *infra,* 29a.

The holding of the court below is both incorrect and, as that court acknowledged (App. A, *infra,* p. 29a), in conflict with the decision of the D.C. Circuit in *Charles River Park "A", Inc. v. H.U.D., supra.*[28] There, the D.C. Circuit examined the very same legislative history of the 1958 amendment to § 301 [29] upon which the court below relied, yet concluded, contrary to the Third Circuit, that "Section 301 does not authorize regulations limiting the scope of section 1905." 519 F.2d at 942-3.

The divergent interpretations by these circuit courts of the same statute and underlying legislative history warrants this Court's review, particularly in light of the unsettling consequences which judicial uncertainty on this question must have within the Government. Section 1905 is a criminal provision which imposes penalties upon government employees who disclose certain types of documents "to any extent not authorized by law." Many government officials must routinely decide whether or not to disclose documents pursuant to agency disclosure regulations which have been promulgated pursuant to 5 U.S.C. § 301. Yet, as

[28] See also National Parks and Conservation Assn. v. Kleppe, 547 F.2d 673 (D.C.Cir. 1976); and Sears, Roebuck and Co. v. GSA, *supra.*

[29] The sponsor of the amendment expressly stated that it did "not affect the confidential status of information given to the government and carefully detailed in Title 18, United States Code, Section 1905." 104 Cong. Rec. 6550 (1958).

a result of the conflict among the circuits created by the decision of the court below, these government officials are now left without reliable guidance as to whether those regulations provide the authorization for disclosure necessary under 18 U.S.C. § 1905.[30]

Review of the decision below is also warranted in light of the fact that, under the position taken by the Third Circuit, agency officials such as Respondents who are potential defendants in a criminal action brought under § 1905 for the unlawful disclosure of documents are free to define or redefine the scope of illegal conduct under that statute merely by amending or promulgating agency regulations which authorize disclosure.[31] Thereby, these potential defendants can relieve themselves of criminal liability for acts which, absent the slender thread of their own agency regulations, would violate § 1905.[32] Such a result not only violates § 1905 but also contravenes public policy by allowing government officials who violate 18 U.S.C. § 1905 to exculpate themselves merely by promulgating broad agency disclosure regulations in justification of their conduct.[33]

[30] See n. 16, *supra.*

[31] Indeed, in the instant case the disclosure regulations (41 C.F.R. Part 60-40) which were found by the court below to render § 1905 inoperative were promulgated by Respondents *without* prior notice or opportunity for public comment.

[32] This possibility was foreseen by the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger:* "It would be an incredible rule that a legislative prohibition such as § 1905, fixing limits on executive action . . . , is to be construed and applied by the executive . . . This would be tantamount to committing the execution of such law to 'the self-restraint of the executive branch' itself and making the executive's *ipse dixit* final." 542 F.2d at 1215 (citations omitted).

[33] Should this Court decide that agency disclosure regulations

3. Finally, this Court should declare whether in an action to enjoin disclosure of documents which assertedly will contravene FOIA Exemption 4 and 18 U.S.C. § 1905, the plaintiff is entitled to a trial *de novo* or, as the court below held, to only a more limited form of judicial review under the Administrative Procedure Act. The court below, finding that a cause of action could not be implied under 18 U.S.C. § 1905 or Exemption 4, held that a submitter's cause of action in a re-

promulgated under 5 U.S.C. § 301 do not constitute "authorization by law" within the meaning of 18 U.S.C. § 1905, Petitioner submits that the Court should also consider the related question of whether 18 U.S.C. § 1905 is a specific statutory exemption from disclosure within the meaning of Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), and therefore whether documents whose disclosure would violate § 1905 are also exempt from mandatory disclosure under the FOIA. At present, the circuit courts are divided on this question. *Compare* Westinghouse Electric Corp. v. Schlesinger, *supra* (holding that § 1905 is an Exemption 3 statute) with Charles River Park "A", Inc. v. HUD, *supra* (holding that § 1905 is not an Exemption 3 statute). Indeed, the D.C. Circuit, in one of its most recent decisions on the issue, referred to this as the "threshold question" in reverse FOIA cases involving confidential, commercial information and expressly asked this Court for guidance on the issue. Sears, Roebuck and Co. v. GSA, 553 F.2d at 1385.

This question has been presented to the Court at least three times within the past year. See Brief of Respondent United States Steel Corporation in Support of the Petition, pp. 4-8, in Brown v. Westinghouse Electric Corp., *supra;* Petition for Writ of Certiorari, at pp. 20-27, in The Prudential Insurance Company v. National Organization for Women, *supra;* Petition for Writ of Certiorari, pp. 8-9, in Sears, Roebuck and Co. v. GSA, *supra.* However, none of those cases presented the preliminary question—whether agency regulations constitute "authorization by law"—in the context of a split among the circuits, thus possibly explaining this Court's reluctance to decide the Exemption 3 issue. In contrast, as a result of the decision of the court below, both issues are now the subject of sharp disagreement among the circuits, making this case an appropriate vehicle for resolution of this troublesome matter.

verse FOIA case arose only under the APA."[34] Reciting that "[j]udicial review under the APA ordinarily is limited to a 'review of the whole (agency) record or parts of it cited by a party' [5 U.S.C. § 706 (1970)]" (App. A, *infra,* pp. 36a-37a), the court held that, absent *inter alia* a finding that the agency's factfinding procedures are inadequate, the scope of judicial review in reverse FOIA actions was to be limited to a determination of whether the disclosure decision was arbitrary, capricious or an abuse of discretion. App. A, *infra,* pp. 36a-39a; see 5 U.S.C. § 706.

The holding of the court below is contrary to the holdings of numerous other federal circuit and district courts[35] which have held that a plaintiff in a reverse FOIA action is entitled to *de novo* review of its claims under 18 U.S.C. § 1905 and FOIA Exemption 4. Thus, in *Charles River Park,* the D.C. Circuit observed:

> "A plaintiff in a suit such as this is obviously entitled to no relief if the government could be forced to disclose the information it wishes to reveal in a suit under the FOIA. Thus, the district court should hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure. *See* 5 U.S.C. § 552(b)

[34] The court held that Congress did not intend "that the [FOIA] exemptions . . . provide the predicate for an implied cause of action" and "reject[ed] the proposition that § 1905 would serve as a predicate for a private civil cause of action." App. A, *infra,* pp. 23a, 30a.

[35] *See, e.g.,* Charles River Park "A", Inc. v. HUD, *supra;* Sears, Roebuck and Co. v. GSA, *supra;* Westinghouse Electric Corp. v. Schlesinger, *supra;* General Dynamics Corp. v. Dunlop, *supra;* Sonderegger v. Department of the Interior, 424 F.Supp. 847 (D. Idaho 1976); Hughes Aircraft v. Schlesinger, 384 F.Supp. 292 (C.D.Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.).

(3); National Parks and Conservation Association v. Morton [498 F.2d 765 (D.C.Cir. 1975)]. *In holding this hearing the district court is not reviewing agency action; it is making a threshold determination whether the plaintiff has any cause of action at all.*" 519 F.2d at 940 n.4. (Emphasis added).

Similarly, in *Westinghouse Electric Corp.* v. *Schlesinger,* the Fourth Circuit expressed the same view:

> "Should not the person who was threatened with harm through a disclosure, which Congress had indicated clearly is against the public policy as expressed in the FOIA itself be the proper one to assert that right to protection from disclosure assured him under Exemption four, in an equity action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him 'not only as a matter of fairness but as a matter of right,' seeks what may be regarded as correlative relief?" 542 F.2d at 1213.

While some of the courts which have reached this conclusion have no doubt been influenced by, *inter alia,* their view that an implied cause of action exists under Exemption 4 and 18 U.S.C. § 1905 to enjoin disclosure of confidential information in contravention of those statutes,[36] the conclusion that the reverse FOIA plain-

[36] See, *e.g.,* Westinghouse Electric Corp. v. Schlesinger, where the Fourth Circuit held both that "[t]he FOIA itself . . . confers on a supplier of *private* information, an implied right to invoke the equity jurisdiction to enjoin the disclosure of information within Exemption 4" and that a cause of action may be implied to enjoin "the threat of action by a public officer '. . . contrary to a specific [federal statutory] prohibition' such as § 1905 . . ." 542 F.2d at

tiff is entitled to a *de novo* trial pertains even if review is predicated solely upon the APA. Thus, even within the District of Columbia Circuit, where the submitter's cause of action in reverse FOIA cases has been found to arise under the APA, the circuit court has directed the district courts to conduct a *de novo* judicial determination of whether the information is subject to mandatory disclosure, or exempt from disclosure, under the FOIA. *See Sears, Roebuck and Co.* v. *GSA,* 553 F.2d at 1381; *Charles River Park "A", Inc.* v. *HUD,* 519 F.2d at 940 n. 4; *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1207.

This case presents an excellent opportunity for the Court to resolve the conflict on this important federal question. Because the issue is one which pervades all reverse FOIA actions and which has great practical significance [37] to persons who are aggrieved by improper

1209, 1210.

The decisions of the Third and Fourth Circuits are clearly in conflict on this point. See n. 34, *supra.* Although the resolution of this question will not significantly affect the access of submitters to the courts (since all courts have recognized the existence of some kind of cause of action), the issue does have substantial bearing on the scope of proceedings to be conducted in the district courts, i.e., whether there is to be a *de novo* trial. Consequently, should the Court be of the view that a *de novo* trial would not be appropriate in an action which is predicated on the APA, Petitioner submits that the Court should then consider whether a cause of action can, as the Fourth Circuit correctly held, be implied under 18 U.S.C. § 1905 or Exemption 4 and, if so, whether a *de novo* trial would be appropriate in such an action. The exercise of certiorari jurisdiction on this question would be appropriate since the circuit courts have applied the decisions of this Court (*e.g.,* Cort v. Ash, 422 U.S. 66 (1975)) in a conflicting and irreconcilable manner.

[37] Numerous aspects of the agency disclosure process and the FOIA itself demonstrate why a *de novo* judicial determination of whether the disclosure of information would violate § 1905 or

government disclosure of private, confidential information, the Court should not let this opportunity pass by.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Exemption 4 is essential to protect the interests of persons who furnish confidential information to the Government. ***First***, neither the FOIA nor most agency regulations require that notice be provided to persons whose documents are to be disclosed. ***Second***, even where notice is provided gratuitously, disclosure decisions (which often involve complex economic and technical questions) are made within the ten day time limit imposed by the FOIA, a period which generally is far too brief to permit the submitter of the documents to object with specificity or the lay agency official to engage in a thorough examination of the documents, and which renders it likely if not certain that an adequate agency record will *not* be developed. ***Third***, as demonstrated by this case, the FOIA does not require an agency to make findings in support of its decision to disclose and, in fact, virtually no agencies do so, thereby making meaningful judicial review on the basis of the "agency record" impossible. ***Finally***, as also reflected by this case, the essential right to an administrative appeal from an adverse initial disclosure decision is often illusory because agencies, under compulsion of the FOIA time limits, must disclose the documents prior to completion of the appeal. Consequently, a person threatened with disclosure of confidential documents must be afforded the same *de novo* judicial determination of the disclosability of the information which the FOIA *guarantees* to persons seeking to compel disclosure.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-1970 and 76-2238

CHRYSLER CORPORATION

v.

JAMES A. SCHLESINGER, Secretary United States Department of Defense; LT. GEN. WALLACE ROBINSON, Director, Defense Supply Agency; PHILIP J. DAVIS, Director, Office of Federal Contract Compliance, and JOHN DUNLOP, Secretary United States Department of Labor

CHRYSLER CORPORATION, Appellant in No. 76-1970

JAMES A. SCHLESINGER, Secretary United States Department of Defense; LT. GEN. WALLACE ROBINSON, Director, Defense Supply Agency; PHILIP J. DAVIS, Director, Office of Federal Contract Compliance; and JOHN DUNLOP, Secretary United States Department of Labor, Appellants in No. 76-2238

(D.C. Civil Action No. 75-159)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued June 13, 1977

Before VAN DUSEN, ADAMS and GIBBONS, *Circuit Judges*

Opinion of the Court

(Filed September 26, 1977)

[As amended by order dated October 18, 1977]

GIBBONS, *Circuit Judge*

Plaintiff, Chrysler Corporation (Chrysler), appeals and defendants, federal government officials,[1] cross-appeal, from a final judgment of the district court in an action for injunctive and declaratory relief aimed at preventing public disclosure of certain documents furnished by Chrysler to federal governmental agencies. The action was originally prompted by the decision of the defendants to honor a request by third parties[2] for public disclosure of the contested documents under the Freedom of Information Act (FOIA).[3] The district court, after a trial *de novo*, permanently enjoined public disclosure of certain portions of the contested documents, but denied the full range of injunctive relief requested by Chrysler, and also denied its request for a declaratory judgment that any future disclosure of similar documents would violate federal law. Chrysler appeals from the denial of the full declaratory and injunctive relief it requested. The federal government defendants in their cross-appeal originally contended (1)

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[1] James R. Schlesinger, Secretary, United States Department of Defense; Lt. Gen. Wallace Robinson, Director, Defense Supply Agency; Philip J. Davis, Director, Office of Federal Contract Compliance; and John Dunlop, Secretary, United States Department of Labor.

[2] The parties who initially sought disclosure of Chrysler's documents neither intervened nor sought to participate in either the district court proceedings or the proceedings in this court.

[3] 5 U.S.C. § 552 (1970 & Supp. V 1975), as amended by 5 U.S.C. § 552(b)(3) (Supp. 1976), Pub. L. No. 80-554, 80 Stat. 383 (1966).

that Chrysler has no right to judicial review of any agency decision to disclose information requested by third parties under the FOIA; (2) that even if judicial review is available the scope of review is limited to that defined in the Administrative Procedure Act,[4] and does not include a trial *de novo;* and (3) that even if a trial *de novo* was proper the district court erred in enjoining disclosure of portions of the contested documents. After the government's initial brief was filed in this court the Solicitor General, in a petition for a writ of certiorari to review the decision of the Fourth Circuit in *Westinghouse Elec. Corp. v. Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Elec. Corp.,* U.S. (1977), took the position that the exceptions to judicial review listed in 5 U.S.C. § 701 were inapplicable to so-called reverse FOIA actions,[5] and that Pub. L. 94-574, 90 Stat. 2721, eliminated federal sovereign immunity as a bar to such review. We have been advised by the Justice Department that it is now the government's position that judicial review is available to parties objecting to disclosure of information under the FOIA, but that the Administrative Procedure Act controls our scope of review. Chrysler contended in the district court, and continues to urge here, that any disclosure of the contested documents was prohibited by several federal statutes to which specific reference will be made hereafter and by the due process clause of the fifth amendment. It maintained in the district court, and urges here, that a trial *de novo* was proper. Because we are in substantial agreement with the government's present position we vacate the judgment of the district court and remand for further proceedings.

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[4] See 5 U.S.C. § 701 *et seq.*

[5] See n.43 *infra.*

I

The Regulatory Framework

Chrysler is a government contractor. As a condition of its doing business with the government it is required by an Executive Order,[6] and regulations promulgated thereunder by the Secretary of Labor,[7] to employ and treat all employees without regard to race, color, religion, sex, or national origins, and to take affirmative action to eliminate discrimination in employment. In order to monitor compliance with these requirements, federal regulations require that every government contractor or subcontractor with fifty or more employees and a contract valued at $50,000 or more prepare and file an annual Employer Information Report, known as an EEO-1 report.[8] The EEO-1 report contains data on the number of women and minority group members employed. Contractors must also prepare and make available for inspection by appropriate federal agencies an Affirmative Action Program (AAP), providing detailed information on their past and projected employment of women and minority group members.[9] The AAP must contain a "utilization analysis" which describes the occupational levels of minority personnel employed by the contractor and "goals and time tables" by which opportunities for minority group members can be improved.[10] The failure of a contractor to comply with the Executive Order and regulations can result in the cancellation, ter-

[6] Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14304 (1967), 3 C.F.R. 169-177 (1974).

[7] 41 C.F.R. 60-1.1 *et seq.*

[8] *Id.* at 60-1.7(a).

[9] *Id.* at 60-1.40, 60-2.1.

[10] *Id.* at 60-2.10.

mination, or suspension of existing contracts and debarment from future awards.[11]

The Secretary of Labor has delegated administrative responsibility for the enforcement of the Executive Order to the Director of the Office of Federal Contract Compliance (OFCC).[12] The Director of OFCC has designated various federal agencies as "compliance agencies." These compliance agencies have primary responsibility for assuring adherence to the Executive Order by contractors within certain geographic areas or industrial classifications.[13] In Chrysler's case the Defense Supply Agency of the Department of Defense (DSA) is the designated compliance agency. As part of its monitoring duties DSA has conducted "compliance reviews" of Chrysler's employment practices. These reviews consist of an examination of Chrysler's EEO-1 and AAP documents, and on site inspections of its facilities. Compliance reviews result in a compliance review report (CRR), setting forth information supplied by the contractor, an analysis of his performance, and recommendations for sanctions or corrective measures.[14] DSA is also responsible for investigation and resolution of complaints of violations of the Executive Order,[15] and must file a "complaint investigation report" (CIR) with OFCC within sixty days of the receipt of a complaint.[16]

Regulations promulgated by the Secretary of Labor contain rules providing for access by the public to infor-

[11] *Id.* at 60-1.24.

[12] *Id.* at 60-1.2. OFCC is the successor to the President's Committee on Equal Employment Opportunity. *See* 30 Fed. Reg. 12319, 13441.

[13] *Id.* at 60-1.3(d), 60-1.6.

[14] *Id.* at 60-60.9.

[15] *Id.* at 60-1.24(b).

[16] *Id.* at 60-1.24(d).

mation in the records of OFCC or its various compliance agencies.[17]

> The regulations implement 5 U.S.C. § 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 C.F.R. Part 70. It is the policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment....

41 C.F.R. § 60-40.1. Consistent with the general policy of disclosure to aid in eliminating employment discrimination, the regulations provide:

> [U]pon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

41 C.F.R. 60-40.2(a). Thus the regulations contain a blanket waiver of any authority the government might have to resist disclosure of any information which falls into one of the nine categories of information which are exempt from mandatory disclosure under the FOIA.[18]

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[17] *Id.* at 60-40.1 *et seq.*

[18] In enacting the FOIA Congress recognized that certain types of information, such as trade secrets and other confidential matters, should be exempt from the Act's mandatory public disclosure provisions. Consequently, the FOIA specifically exempts nine categories of information from mandatory disclosure.

This section does not apply to matters that are—

(1)(A) specifically authorize under criteria by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of finan-

OFCC's regulations also provide that ". . . all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere

herein." 41 C.F.R. § 60-40.2(b). This blanket and mandatory disclosure requirement with respect to compliance documents is qualified in 41 C.F.R. § 60-40.3(a) which lists six categories of documents or parts thereof which "are exempt from mandatory disclosure by the OFCC and the compliance agencies and should be withheld if it is determined that the requested information does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies." [19] Thus, even information within these six categories

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cial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b) (Supp. 1976), amending 5 U.S.C. § 552(b) (1970 & Supp. V 1975).

[19] 41 C.F.R. § 60-40.3(a) provides:

(a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers of such disclosure would subject the named compliance

may be disclosed if OFCC determines that such disclosure is in the public interest and does not impede the discharge of the functions of OFCC or its compliance agencies. Finally, 41 C.F.R. § 60-40.4 [20] provides that EEO-1 reports shall be disclosed, even though the exact same forms are furnished to the Equal Employment Opportunity Commission (EEOC)[21] and EEOC is statutorily prohibited from disclosing EEO-1 reports in its possession.[22]

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officers to undue harassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

[20] 41 C.F.R. § 60-40.4 provides:

> The Standard Form 100 (EEO—1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709(e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

[21] Employers subject to the provisions of both Executive Order No. 11246 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, are required to file EEO-1 reports with both EEOC (*see* 29 C.F.R. § 1602.7) and OFCC. To facilitate the collection of these reports EEOC and OFCC have established the Joint Report-

The contested documents in this case include Chrysler's EEO-1 reports and information which falls under three of the six exempt categories defined in 41 C.F.R. § 60-40.3(a),[23] namely: (1) those parts of Chrysler's AAP's which contain confidential commercial information indicating that a contractor plans major changes or shifts in his personnel requirements not yet publicly disclosed,[24] (2) those parts of Chrysler's AAP's which set forth staffing patterns and pay scales the release of which would injure the business or financial position of the contractor,[25] and (3) compliance investigation files and related documents to the extent that such information constitutes trade secrets and confidential commercial or financial information.[26]

II

The Agency Proceedings

On May 14, 1975, DSA notified Chrysler that third parties had requested under the FOIA the disclosure of the 1974 AAP of Chrysler's Newark, Delaware assembly plant, and the October 1974 CIR for that facility. Chrysler, on May 23, 1975 objected to the requested disclosure of the AAP, relying on the FOIA exemptions and OFCC disclosure regulations. It also requested a copy of the

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ing Committee (JRC), which receives and processes these reports, and then distributes a copy of each EEO-1 report both to EEOC and OFCC.

[22] Section 709(c) and (d) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c) and (d) authorize EEOC to collect the data contained in the EEO-1 reports. Public disclosure of such data by EEOC is, however, prohibited by § 709(e), 42 U.S.C. § 2000e-8(e). See text at IV B 2 *infra*.

[23] See n.19 *supra*.

[24] 41 C.F.R. § 60-40.3(a)(1).

[25] *Id.* at § 60-40.3(a)(2).

[26] *Id.* at § 60-40.3(a)(5).

October 1974 CIR, which it had never seen, so that it could determine which parts of it should be treated as confidential. On May 30, 1975, DSA notified Chrysler that it had determined that the Newark AAP and CIR were subject to disclosure under the FOIA and OFCC disclosure rules, that Chrysler would not be furnished with a copy of the CIR prior to disclosure, and that both documents would be disclosed on June 4, 1975.

On July 1, 1975, DSA notified Chrysler that it had received a request under the FOIA for disclosure of the AAP and CRR for Chrysler's Hamtramck, Michigan assembly plant. The July 1 notice indicated that under the recent amendments to the FOIA, Pub. L. 93-502, 5 U.S.C. § 552(a)(6)(A)(i), DSA was required to make a substantive decision on release of these documents within ten working days of receipt of the request, and for that reason could not await the results of an appeal to OFCC under 41 C.F.R. § 60-60.4(d).[27] The DSA letter suggested that any

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[27] 41 C.F.R. § 60-60.4(d) provides:

(d) *Public access to information.* Information obtained from a contractor under Subpart B will be subject to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552. Contractors should identify any information which they believe is not subject to disclosure under 5 U.S.C. 552, and should specify the reasons why such information is not disclosable. The Contract Compliance Officer will consider the contractors claim and make a determination, within 10 days, as to whether the material in question is exempt from disclosure. The contract compliance officer will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal. However, during the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated within a reasonable time, all information obtained from a contractor under Subpart B except information disclosable under §§ 60-40.2 and 60-40.3 of this chapter is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 552(b)(7), and such information obtained from a contractor under Subpart B shall be

comments Chrysler wished to make should be accomplished promptly. Chrysler, by letters dated July 3 and July 11, 1975, objected to the disclosure of the documents relating to its Hamtramck plant, contending that both the AAP and CRR were exempt from disclosure under the FOIA, and also that disclosure of certain information contained in the AAP, including EEO-1 data, was prohibited by 18 U.S.C. § 1905,[28] by § 709(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e),[29] and by 44 U.S.C. § 3508.[30] Chrysler's letter also requested a copy of the Hamtramck CRR, which it had never seen. On July 18, 1975, DSA replied in part:

> Full consideration has been given by this agency to your comments and objections. Nevertheless, a determination has been made to release both the Affirmative Action Plan and the Compliance Review Report to the requester, subject to the exceptions noted in the attached list for the reasons given therein. Your assertions of competitive harm were unsupported by any showing of the likelihood of such harm, and only in one context would we agree to the existence of such a likelihood without such a showing. This is reflected in the first ten exceptions on the attached list.
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> This decision may be appealed to the Office of Federal Contract Compliance, Washington, D.C. 20210, within 10 days, per 41 C.F.R. 60-60.4. However, due to the time constraints imposed by the recent amendments to the Act (Public Law 93-502), we cannot wait for

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treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review.

[28] See n.44 *infra*.

[29] See n.22 *supra*.

[30] See text at n.85 *infra*.

> the results of such an appeal. Accordingly, the subject documents, with deletions as noted in the attached list, will be released 5 working days after your receipt of this letter.

(JA-100) The July 18 letter also made clear DSA's position that neither 18 U.S.C. § 1905, 42 U.S.C. § 2000e-8(e) nor 44 U.S.C. § 3508 applied to any part of the AAP report, including the EEO-1 data.

III

The District Court Proceedings

Faced with the DSA determination that the FOIA, as amended, prohibited the agency from withholding disclosure while Chrysler exhausted an administrative appeal to OFCC, Chrysler commenced this action in the district court on June 4, 1975. The initial complaint, which was filed before Chrysler learned of the request for disclosure of the Hamtramck documents, only sought injunctive relief against disclosure of the documents relating to the Newark Delaware plant, and a declaratory judgment that public disclosure of any similar documents was prohibited by law. The district court issued a temporary restraining order which prohibited disclosure of the Newark plant documents, and which required the defendants to give Chrysler five days notice prior to the release of any similar documents relating to any of its other facilities. When DSA notified Chrysler of its intention to release the Hamtramck plant documents it amended the complaint to refer to those documents, and obtained from the district court temporary relief covering them as well.

Chrysler's amended complaint contained three counts. First, Chrysler charged that disclosure of any portion of its AAP's, EEO-1's, or of any CIR, or CRR relating to any of its facilities would be unlawful under exemptions (b)(3)(4)(5) and (7) of the FOIA, 5 U.S.C. § 552(b)(3)

(4)(5) and (7),[31] under 42 U.S.C. § 2000e-8(e),[32] under 18 U.S.C. § 1905,[33] and under 44 U.S.C. § 3508.[34] Second, it alleged that such disclosure would be an abuse of agency discretion since it would be contrary to 41 C.F.R. § 60-40.3(a)[35] and 29 C.F.R. §§ 70.21,[36] 70.22,[37] 70.24,[38] and

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[31] See n.18 *supra*.

[32] See n.22 *supra*.

[33] See n.44 *infra*.

[34] See text at n.85 *infra*.

[35] See n.19 *supra*.

[36] 29 C.F.R. § 70.21 provides:

(a) Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law.

(b) No records of the Department of Labor with respect to matters specifically required by statute to be kept secret shall be made available for inspection or copying under the provisions of this part. By virtue of the exclusionary language in 5 U.S.C. 552(b)(3) the disclosure requirements of the Freedom of Information Act do not apply to or authorize the disclosure of records with respect to any matters specifically exempted from disclosure by statute.

(c) No records of the Department of Labor with respect to matters specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy and properly classified pursuant to such order shall be made available for inspection or copying under the provisions of this part. Records concerning such matters are expressly excluded

from the application of the disclosure requirements of the Freedom of Information Act by the provisions of 5 U.S.C. 552(b)(1).

[37] *Id.* at 70.22 provides:

(a) *Records exempt from statutory disclosure requirements.* The Freedom of Information Act, as codified in 5 U.S.C. 552, lists nine categories of records (in 5 U.S.C. 552(b)) to which the disclosure requirements of the statute do not apply. The first and third of these relate to the records described in § 70.21 which are not disclosable because protected from disclosure by the express provisions of a statute or a secret classification authorized by Executive order in the interest of national defense or foreign policy. The other seven categories of records excluded from the statutory disclosure requirements are set forth in §§ 70.23 through 70.28, inclusive. Information from records in these seven categories may, however, be made available for inspection and copying as provided in paragraph (b) of this section.

(b) *Disclosure of protected records; conditions precedent.* Although the Department of Labor is not required by the Freedom of Information Act to make available for inspection or copying any materials or documents included in its records which are within the categories described in 5 U.S.C. 552(b)(2), (4), (5), (6), (7), (8), or (9) (see §§ 70.23-70.28), under the Department's disclosure policy set forth in § 70.11 particular records requested which come within these categories, or portions thereof, shall nevertheless be made available to the extent, but only to the extent, that the appropriate officer authorized to disclose information from Department records determines that the disclosure will further the public interest and will not impede the discharge of any of the functions of the Department of Labor. Such a determination shall be made with due regard not only to the public interest in accessibility to the people of information regarding operations of their Government but also to the public interest in protecting citizens from impairment of their rights to privacy or from harassment, injury, or the dissemination of information concerning them which is privileged or has been submitted by them to the Government on a confidential basis. In determining whether access to such records will be permitted, due consideration shall also be given to the public interest in preventing disclosure of information which would handicap, obstruct, or jeopardize effective performance of the Department's functions under statutes or Executive orders, including its duties with respect to law enforcement.

[38] *Id.* at 70.24 provides:

(a) Pursuant to exemption (4) set forth in 5 U.S.C. 552(b), and as provided in § 70.22, the disclosure from Department of Labor records of matters that are trade secrets, and of commercial and financial information obtained from a person and privileged or confidential, may be refused. Legal requirements of secrecy and prohibitions of disclosure may apply to such records as set forth in § 70.21. Disclosure shall be refused where these mandatory restrictions apply to the records sought. Even where denial of access is not required by these restrictions, access to records exempted from the disclosure requirements by exemption (4) cannot be granted under the policy expressed in §§ 70.11 and 70.22 unless the disclosure officer, in balancing the right of the public to know how the Government operates against the need of the Government to keep information in confidence and the right of the person from whom it was obtained to have privileges and confidences respected, is able to determine that disclosure will serve the public interest and not impede the discharge of any function of the Department of Labor.

(b) The intent of the examination set forth in paragraph (a) of this section to protect privileged or confidential information is, according to the committee reports in both Houses of Congress, not restricted to the trade secrets and commercial or financial information specifically mentioned in the statute. Information the disclosure of which may be refused pursuant to this exemption is, according to the legislative history, intended to include information customarily subject to a doctor-patient, lawyer-client, or other such privilege.

(c) Information "obtained from any person" would include information obtained from a person inside as well as outside the Government. The applicability of this exemption does not depend on whether the record contains information obtained from the public at large, from a particular person, from within the Department, or from another agency. While information which is confidential in the hands of one agency retains its protected character in the hands of agencies to which it is subsequently furnished, the exemption does not sanction the rendering of documents confidential by the expedient of transferring them among agencies.

(d) Except as otherwise provided in this part (e.g., § 70.13), disclosure in certain circumstances may be refused of material such as formulae, designs, drawings, research data, and the like, which are significant not as records but as items of valuable property. These may have been developed by or for the Government for its use and at its expense. Nothing in the legislative history suggests that the Freedom of Information Act was intended to give away

such valuable property to any person willing to pay the price of making a copy. Where similar property in private hands would be held in confidence, the public interest would appear to require that such property in the hands of an agency should be protected under exemption (4).

(e) This exemption is further intended to extend protection to other information in Government records which has been furnished and accepted in confidence and which would not customarily be released to the public by the person from whom the Government obtained it. See, for example, the House Report (H. Rept. 1497, 89th Cong., 2d Sess.) and the President's signing statement. Accordingly, the exemption assures the confidentiality of information thus obtained by the Department of Labor through questionnaires and required reports to the extent that the information would not customarily be made public by the person from whom it was obtained. Nothing in the Freedom of Information Act necessitates a disregard of the right of individuals or groups to rely in good faith on an understanding of confidentiality for which a Government agency has reasonably afforded a basis. Maintenance of citizens' respect for governmental fairness requires that such understanding be given due consideration. At the same time, Department representatives should be alert to discourage the development of such understandings where not clearly warranted by departmental responsibilities.

(f) Pursuant to exemption (8) set forth in 5 U.S.C. 552(b), and as provided in § 70.22, the disclosure from Department of Labor records of any matter contained in, or related to, examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, may be refused. Exemption (8) emphasizes the application to financial institutions of the protection from disclosure afforded by the exemption set forth in paragraph (a) of this section, and makes plain the intent to protect information relating to such institutions which may be prepared for or used by any agency responsible for the regulation or supervision of such institutions. Access to any such information in records of the Labor Department will be refused where disclosure is not legally permitted or where a determination to disclose is inappropriate for reasons discussed in paragraph (a) of this section. In cases where another agency is concerned with information protected by exemption (8) in 5 U.S.C. 552(b) which is sought from records of the Department, the provisions of § 70.31 are also applicable.

70.31.[39] Third, it contended that the FOIA and OFCC disclosure rules as applied to Chrysler violate due process in that they afford no meaningful right to be heard initially or on appeal before disclosure of Chrysler's confidential information. By a stipulation and consent order the *pendente lite* restraints were continued until final hearing. In its pre-trial papers the government defendants objected to the court's jurisdiction and to the holding of an evidentiary hearing. The court reserved decision on these objections until a decision on the merits. Trial on the merits was held on August 25 and 26, 1975 and thereafter the parties filed a detailed "Stipulation of Facts and Issues."

The district court's opinion correctly holds that there is subject matter jurisdiction under 28 U.S.C. § 1331(a).[40] On the merits the court found that part of the information the agency proposed to release, described generically as the "manning tables,"[41] was confidential commercial in-

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[39] *Id.* at 70.31 provides:

If the release of a record in custody of the Department of Labor would be of concern not only to the Department but also to another Federal agency, the record will be made available by the Department only if its interest in the record is the primary interest and only after coordination with the other interested agency. If the interest of the Department in the record is not primary, the request will be transferred promptly to the agency having the primary interest, and the applicant will be so notified. The release of information received from another agency and the release to another agency of information collected from persons outside the Government shall be subject to the conditions and restrictions imposed by 44 U.S.C. 3508.

[40] *E.g.*, Planning Research Corp. v. F.P.C., 555 F.2d 970 (D.C. Cir. 1977); Westinghouse Elec. Corp. v Schlesinger, supra, 542 F.2d at 1209-10; Sears, Roebuck & Co. v. General Services Administration, Civ. No. 75-2127, Slip op. at 3 & n.6 (D.C. Cir. filed April 1, 1977); see Bachowski v. Brennan, 502 F.2d 79, 82 (3d Cir. 1974), *rev'd on other grounds*, 421 U.S. 560 (1975); cf. Califano v. Sanders, 45 U.S.L.W. 4029 (U.S. February 23, 1977).

[41] The district court described the manning tables as lists of

formation, the release of which could cause Chrysler substantial competitive harm.[42] On the basis of this finding the court concluded that the manning tables constituted information falling within exemption (b)(4) of the FOIA, and was therefore exempt from its mandatory disclosure provisions. The court then reasoned that since the manning tables constituted exempt information under the FOIA, whether DSA possessed the power to disclose these documents was to be determined by reference to other federal disclosure statutes, apart from the FOIA. Thus the court rejected Chrysler's argument that the FOIA creates a so-called reverse FOIA cause of action based on the theory that Congress, by exempting certain information from mandatory disclosure, intended to absolutely prohibit all agency disclosure of such exempt information under any circumstances.[43] Instead, the court held that 18 U.S.C. § 1905,[44] a criminal statute, made it a crime for a

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Chrysler's internally used job titles and the number of people who perform each job.

[42] In reaching this conclusion the court relied on the testimony of Chrysler's witnesses, rather than on the rather spare administrative record.

[43] *See generally*, Clement, The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit, 55 Texas L.R. 587 (1977); Note, Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection, 70 Nw. U.L. Rev. 995 (1976); Note, Protection From Government Disclosure—The Reverse-FOIA Suit, 1976 Duke L.J. 330.

[44] 18 U.S.C. § 1905 provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or

government employee to disclose the manning tables. Observing that the Secretary of Labor, on the authority of 5 U.S.C. § 301,[45] a general statute providing for the use and custody of government records, promulgated 29 C.F.R. § 70.21(a),[46] which forbids disclosure of confidential information the release of which would violate 18 U.S.C. § 1905, the court concluded that DSA was acting in violation of its own regulations and contrary to law. Thus it construed what it held to be DSA's governing regulation as consistent with 18 U.S.C. § 1905. It issued the injunction appealed from on the authority of 5 U.S.C. § 706(2)(A) to prevent agency action "not in accordance with law." The court also held that 42 U.S.C. § 2000e-8(e) was inapplicable, and rejected Chrysler's due process contentions.

IV

Discussion

This case is one of a burgeoning number growing out of the conflict between the demands of federal regulatory agencies, as a necessary by-product of their regulatory activities, for the submission by private businesses of detailed financial, commercial and employee information, which would not voluntarily be disclosed to competitors, and the public access to most information in federal

relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

[45] See text following n.69 *infra*.

[46] See n.36 *supra*.

agency files which is mandated by the FOIA. It is, however, the first occasion which requires this Court to consider a reverse FOIA case, in which a corporate plaintiff (the submitter) seeks to enjoin an agency from disclosing submitter-generated business information.[47] The case presents several important issues about agency management of such information, about agency discretion to disclose information in the public interest, about submitter rights prior to disclosure and about the availability of remedies for the prevention of disclosure.

The FOIA requires agencies to disclose upon request any information not falling within one of nine specifically exempted categories.[48] The arguments of Chrysler and other corporate submitters seeking to prevent disclosure break down into three broad categories. First, Chrysler and others have urged that the FOIA itself both prohibits agency disclosure of information falling within any of the nine exemptions and affords an implied cause of action for injunctive or declaratory relief to prevent such disclosure. Second, they have claimed that even if the FOIA does not prohibit agency disclosure of exempt FOIA information, other statutes, such as 18 U.S.C. § 1905 and 42 U.S.C. § 2000e-8(e) do so, and afford an implied cause of action. Third, they contend that disclosure of submitter-generated business information that is exempt under the FOIA or protected by some other federal statute or regulation is an abuse of agency discretion subject to judicial review under the Administrative Procedure Act at the behest of a submitter adversely affected by such agency action. The first two categories would afford relief in the form of a trial *de novo*, while in the third judicial review would be limited to that available under 5 U.S.C. § 706. The posture

[47] *But cf.* Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n, 555 F.2d 82, 93-94 (3d Cir. 1977).

[48] See n.18 *supra*.

of this appeal and cross-appeal requires that we address each theory on which a reverse FOIA action could be founded.

A. *The Freedom of Information Act*

The FOIA expressly creates a cause of action in favor of requesters of information to enjoin federal agencies from withholding information.[49] It does not by its terms provide a cause of action for submitters of information to prevent disclosure. But while there is no express provision for an action by submitters, the FOIA's nine categories of exempt information [50] disclose a Congressional concern that disclosure of certain information might injure interests in privacy or confidentiality which may be as important as the public's right to general access to agency information. The fourth FOIA exemption, for example, covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential." [51] There is ample Congressional history suggesting that Congress sought to afford some protection of submitters' interest in the confidentiality of such information.[52] Moreover we recognize that disclosure of submitter information is qualitatively different from disclosure of data directly relating to government operations, and that the interest in privacy appears stronger with respect to the former than the latter. But while the Congressional concern over confidentiality of submitter information is clear, an intention to make mandatory the nondisclosure of exempt information is less so, and the evi-

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[49] 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975).

[50] See n.18 *supra*.

[51] *Id.*

[52] *See, e.g.*, S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10, reprinted in 2 U.S. Code Cong. & Ad. News 2418, 2427 (1966).

dence of an intent to create a submitter cause of action is practically nonexistent.

Among the circuits which have considered the issue the District of Columbia [53] and the Fifth Circuits [54] have held that the FOIA exemptions are permissive and do not mandate agency withholding of exempt information. The Fourth Circuit has held that the exemptions mandate nondisclosure.[55] The Ninth Circuit, while first holding that the exemptions are mandatory, on rehearing withdrew that part of its opinion as premature.[56] The closest the Supreme Court has come to addressing the issue is the statement in *E.P.A. v. Mink,* 410 U.S. 73, 80 (1973), that the FOIA exemptions "represent[s] the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." [57] In our view, none of the opinions referred to contains a complete analysis of the myriad problems presented in reverse FOIA cases.

We conclude that Congress in the FOIA intended neither that the exemptions make non-disclosure mandatory nor that they provide the predicate for an implied cause of action. The two questions are interdependent,

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[53] Charles River Park "A", Inc. v. Department of HUD, 519 F.2d 935 (D.C. Cir. 1975).

[54] Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976).

[55] Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp., U.S. (1977) (apparently overruling Moore-McCormack Lines, Inc. v. I.T.O. Corp., 508 F.2d 945, 950 (4th Cir. 1974)).

[56] Union Oil Co. of California v. FPC, 542 F.2d 1036, 1045 (9th Cir. 1976).

[57] *See* FAA Administrator v. Robertson, 422 U.S. 225, 262, 269 n.1 (1975); Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

since it would obviously be difficult to imply a cause of action under the FOIA to bar government officials from releasing information the disclosure of which Congress intended to leave to agency discretion or other federal disclosure statutes. Both the plain language of § 552(b)[58] and the Congressional reports and debates suggest that no more was intended than a discretionary exception to the general mandatory duty of disclosure.[59] Nor can we ignore the contrast between the FOIA's express grant of a cause of action for requesters of information[60] and its silence respecting submitter relief. Moreover, we note that when Congress in the Prvacy Act of 1974[61] decided to create a civil cause of action to enjoin agency disclosure of FOIA exempt information it did so explicitly. *See* 5 U.S.C. § 552a(g)(1) (Supp. V 1975). But only private persons, not business entities were afforded this protection.[62] Fi-

[58] The subsection of the FOIA dealing with exempt information only states that the Act's mandatory disclosure requirement "does not apply to matters that are" within the nine exempt categories. See n.18 *supra*.

[59] *E.g.*, H. Rep. No. 1497, *supra* n.52, at 2, 5-7, reprinted in 2 U.S. Code Cong. & Ad. News 2418, 2419, 2422-24 (1966); S. Rep. No. 813, *supra* n.52, at 10; 112 Cong. Rec. 13641 (remarks of Representative Moss, sponsor of the FOIA in the House). ***But see id.*** at 13,645 (remarks of Representative King), 13649 (remarks of Representative Fascell).

[60] See n.49 *supra*.

[61] Pub. L. 93-597, 88 Stat. 1896, codified at 5 U.S.C. § 552a(b) (Supp. V 1975). The Privacy Act covers exempt FOIA information which relates to individuals and provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to any other agency, except pursuant to a written request by, or with the prior insert of, the individual to whom the record pertains . . . ."

[62] The Senate Report to the Privacy Act states that the Act is intended to

> "distinguish between the rights which are given to the citizen as an individual under this Act and the rights of proprietorships, businesses and corporations which are not intended to be covered by this Act. This distinction was to insure that the bill leaves untouched the Federal Government's information activities for such purposes as economic regulations."

S. Rep. No. 1183, 93d Cong., 2d Sess. 79 (1974).

nally, we think that judicial reconstruction of the statute to imply from the exemptions either a mandatory duty of non-disclosure or a cause of action to prevent disclosure, would be inconsistent with the basic purpose of the FOIA, which was not to afford confidentiality, but to overcome restrictive agency interpretations of the original public information section of the Administrative Procedure Act.[63] The general philosophy reflected in the FOIA is that of full agency disclosure to provide the public with speedy access to relevant information.[64] Recognizing an implied cause of action to prevent agency disclosure of exempt FOIA information would, we think, be inconsistent with that general philosophy, since it would place in the hands of interested submitters of information, rather than those of presumably disinterested governmental officials, the authority to take steps which might impede the dissemination of information of public importance. Thus we hold that the FOIA's language, legislative history, and philosophy of full disclosure bar a construction of the Act which mandates agency withholding of exempt information or recognizes an implied cause of action to prevent the disclosure of such information.

B. *Other Non-Disclosure Statutes*

Although we conclude that the FOIA does not limit the discretionary power of federal agencies to disclose exempt

[63] *See* S. Rep. No. 813, *supra* n.52, at 4, S. Rep. No. 93-854, 93d Cong., 2d Sess. at 6 (1974); H. Rep. No. 1497, *supra* n.52, at 4-5, reprinted in 2 U.S. Code Cong. & Ad. News 2418, 2421-22 (1966); H.R. Rep. No. 93-221, 93d Cong., 1st Sess. at 59-60 (1973).

[64] *Id.*

FOIA information, we recognize that the exercise of this discretionary authority may be prohibited, or substantially curtailed, by other federal non-disclosure statutes.[65] *See FAA Administrator v. Robertson, supra,* 422 U.S. at 264-66. Chrysler contends that apart from the FOIA, at least three non-disclosure statutes prohibit DSA from releasing the contested documents. Our consideration of that contention requires, with respect to each statute, the same dual inquiry we made respecting the FOIA: (1) does the statute forbid disclosure of the documents in issue; and (2) if so, can a private cause of action be implied from it.

1. 18 U.S.C. § 1905

The statute on which Chrysler and most other reverse FOIA plaintiffs[66] place principal reliance is 18 U.S.C. § 1905. On its face, this broadly worded criminal statute encompasses virtually every category of business information likely to be in the files of any federal agency.[67] However, in *Westinghouse Elec. Corp. v. Nuclear Regulatory Commission, supra,* we noted that § 1905's broad non-disclosure prohibitions apply only to disclosures "not authorized by law," and held that information disclosed pursuant to a validly enacted agency regulation is authorized by law.[68] Chrysler urges that in *Westinghouse* we erred, that an agency regulation does not have the force of law for purposes of § 1905, and that only specific Congressional statutes can authorize the release of information covered by § 1905. Moreover, it urges that even assuming the correctness of *Westinghouse,* disclosures

[65] For a compilation of federal non-disclosure statutes see Clement, *supra* n.43, at 598 n.40.

[66] *See, e.g.,* Westinghouse Elec. Corp. v. Schlesinger, *supra* n.55; Charles River Park "A", Inc., *supra* n.53.

[67] See n.44 *supra* for text.

[68] 555 F.2d at 94.

pursuant to the OFCC disclosure regulations are not authorized by law for purposes of § 1905, because these regulations were adopted under the authority of 5 U.S.C. § 301, and Congress intended that § 301 not be used to limit the scope of § 1905.

While our discussion of the scope of the "not authorized by law" qualification to § 1905 in *Westinghouse* was not extended, we are confident that the holding is correct. In *Westinghouse* we found authority for the promulgation of the Nuclear Regulatory Commission's disclosure regulations in that agency's Congressionally enacted enabling act. That holding was consistent with those of the Supreme Court in cases involving the disclosure of information by other federal agencies.[69] Though OFCC has no statutory enabling act, it is authorized to promulgate disclosure regulations under the so-called housekeeping statute, 5 U.S.C. § 301, which provides in part:

> The head of an exclusive department or military department may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Section 301 can be traced to the Act of July 27, 1789, Ch. 4, § 4, 1 Stat. 28, dealing with records of the State Department and the Act of August 7, 1789, Ch. 7, § 4, 1 Stat. 49, dealing with records of the War Department. Various housekeeping statutes were collected and codified in 1874,[70] and, as codified, granted authority to prescribe disclosure

[69] *See, e.g.,* FCC v. Schreiber, 381 U.S. 279, 289-94 (1965); Isbrandtsen-Mollen Co. v. United States, 300 U.S. 139 (1937); Norwegian Nitrogen Co. v. United States, 288 U.S. 294 (1933).

[70] *See* Revised Statutes of the United States § 161 (1st ed. 1873-1874).

regulations. The present version, and in particular the last sentence, was enacted in 1958.[71] The legislative history makes clear that the addition of the last sentence was aimed at stopping agencies from relying on the housekeeping statute as authority to deny the requests of citizens for information.[72]

In *Non-Resident Taxpayers Ass'n v. Municipality of Philadelphia,* 478 F.2d 456 (3d Cir. 1973), we held that § 301 authorized a Bureau of the Budget circular that instructs executive departments to furnish information to state and local taxing authorities regarding compensation paid to federal employees. Such a disclosure, absent the regulation, would clearly conflict with the broad language of § 1905. Thus, although we did not expressly address § 1905 in *Non-Resident Taxpayers Ass'n,* the holding is consistent with our conclusion in *Westinghouse,* that disclosures pursuant to validly adopted agency regulations are not subject to the strictures of § 1905.

We have been referred to no legislative history suggesting that § 1905, a 1948 codification of a group of statutes applicable to specific agencies,[73] was intended to

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[71] Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547.

[72] *See* S. Rep. No. 1621, 85th Cong., 2d Sess. 3-4 (1958); H.R. Rep. No. 1461, 85th Cong., 2d Sess. 2 (1958).

[73] *See* Act of June 25, 1948, ch. 645, § 1905, 62 Stat. 683 (codified at 18 U.S.C. § 1905 (1970). The Revisers Notes in the House report, H.R. Rep. No. 304, 80th Cong. 1st Sess. A127-A128 (1947), accompanying the 1948 revision of the Criminal Code states that § 1905 consolidated an income tax statute, 18 U.S.C. § 216 (1940), a Tariff Commission Statute, 19 U.S.C. § 1335 (1940), and a Commerce Department statute, 15 U.S.C. § 176a (1940). The Consumer Federation of America urges in its amicus brief that § 1905 should be interpreted narrowly, and consistent with interpretations of these three predecessor statutes. *See, e.g.,* United States v. Cook, 384 U.S. 257 (1966). The basis of our decision in this case precludes consideration of that contention. For an excellent discussion of the legislative history of § 1905 and its predecessor statutes see Clement, *supra* n.43, at 607-617.

limit the longstanding rulemaking authority under the 1874 codification of the housekeeping statute. Nor do we attach to the statement of Congressman Moss, respecting the 1958 amendment to the housekeeping statute (adding the last sentence of § 301), the same significance as the District of Columbia Circuit in *Charles River Park "A", Inc. v. Department of HUD, supra,* 519 F.2d at 942-43. Relying on Congressman Moss' statement that the 1958 amendment "does not affect the confidential status of information given to the government and carefully detailed in Title 18, United States Code, Section 1905 . . .",[74] that court concluded that "§ 301 does not authorize regulations limiting the scope of § 1905."[75] In doing so, however, the court took the statement out of context. Congressman Moss only stated that the amendment would not affect the confidential status of information covered by § 1905. He did not say that the amendment eliminated disclosure authority existing since 1789, or that it eliminated the "authorized by law" qualification in § 1905. Such an interpretation of the 1958 amendment is totally at odds with its central purpose—the elimination of governmental secrecy[76]—as it would transmogrify § 1905 into a weapon for those parties who advocate government secrecy. Thus we adhere to the position we took in *Non-Resident Taxpayers Ass'n,* that § 301 is a separate source of agency authority for the promulgation of disclosure regulations, and disclosures pursuant to such regulations are authorized by law and immune from the prohibitions of § 1905. Since the OFCC disclosure regulations are valid under § 301, all disclosures pursuant to those regulations are authorized by law and therefore not subject to § 1905.

Since we find authority for the promulgation of the OFCC disclosure regulations in § 301 we need not consider

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[74] 104 Cong. Rec. 6550 (1958).

[75] 519 F.2d at 942-43.

[76] *See* n.72 *supra.*

whether the FOIA itself, properly construed, is an independent source of authority for the promulgation of disclosure regulations for exempt information."[77] Nor need we decide whether absent § 301, Executive Order 11246, which confers authority on the Secretary of Labor to adopt "such rules and regulations . . . as he deems necessary to achieve the purposes of the order",[78] is a separate source of authority for such promulgation. Our deferment of these grounds for sustaining the regulations should not be considered an expression of doubt as to these sources of authority, but only of confidence in our prior § 301 holding.

Even if we were incorrect in the *Westinghouse* holding that agency regulations are laws for purposes of the qualification to § 1905 we would, in any event, reject the proposition that § 1905 would serve as a predicate for a private civil cause of action. Recent pronouncements of the Supreme Court have severely limited the circumstances in which a federal court may imply a private cause of action from a federal statute.[79] Whatever the merits of this trend, the decisions bind us. Here the criminal statute provides for a fine of not more than

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[77] *See* General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969). A number of federal agencies in addition to OFCC have promulgated such regulations. See 28 C.F.R. § 16.1(a) (1976) (Justice Depart.); 43 C.F.R. § 2.13(d) (1976) (Interior Dept.); 45 C.F.R. § 4.74 (1976) (H.E.W.); 29 C.F.R. § 70.11(b) (1976) (Labor Dept.); 24 C.F.R. § 15.21 (1976) (HUD); 49 C.F.R. § 7.51 (1976) (Transportation Dept.); 32 C.F.R. § 286.4(b) (Defense Dept.); 41 C.F.R. § 105-60.104-2 (1976) (GSA); 39 Fed. Reg. 44,602 (1974) (FDA); 39 Fed. Reg. 30, 298 (1974) (Consumer Product Safety Commission).

[78] *See* n.6 *supra*.

[79] *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975), Securities Investors Protection Act v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

$1000, imprisonment for not more than a year, and automatic removal from office upon conviction. The adequacy of these penalties would seem to assure the achievement of the Congressional objectives underlying § 1905. The very breadth of the prohibitions in § 1905 militates against opening the courts to civil suits which may involve substantial problems of construction. Moreover, as we hold hereafter, there is an available remedy under the Administrative Procedure Act, in which judicial review will be enlightened by agency interpretation. We do not believe we can properly imply a cause of action, and thus the right to a trial *de novo*, from § 1905.

2. 42 U.S.C. § 2000e-8(e)

Section 709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e), is a criminal statute making it unlawful

> "for any officer or employee of [EEOC] to make public in any manner whatever any information obtained by [EEOC] pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information."

Like § 1905, the maximum fine is $1000 and the maximum imprisonment one year. And, as with § 1905 and the FOIA, we must determine both whether the prohibition in § 709 (e) applies and, if it does, whether a private cause of action for its enforcement may be implied. By its terms § 709(e) applies only to employees of EEOC, and only to information obtained by that agency on its own statutory authority. Since it is a criminal statute, ordinary rules of construction would seem to preclude its application, at least in a criminal enforcement context, to officers or employees of a different agency or to information obtained by a different agency under that agency's separate authority. Two circuits have concluded that OFCC compli-

ance agencies are not governed by the § 709(e) prohibition.[80] Chrysler argues that those cases were wrongly decided, first because OFCC and EEOC are performing identical antidiscrimination functions, and second, because the EEO-1 reports are filed initially with the Joint Reporting Committtee,[81] which it describes as the alter ego of EEOC.

It has long since been settled in this circuit that the federal government's antidiscrimination effort directed at government contractors rests upon a different authority, and even serves a different, though complementary, purpose that the efforts of EEOC.[82] The Executive Order program antedated the passage of Title VII, and Congress has rejected proposals to transfer the Executive Order functions of OFCC to EEOC.[83] The two agencies function independently, and we decline the invitation to disregard that independence in order to read § 709(e) as applicable to OFCC compliance agencies such as DSA.

The argument that the Joint Reporting Committee (JRC) is the alter ego of EEOC, and that all EEO-1 forms

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[80] Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1199 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp. U.S. (1977); Sears, Roebuck and Co. v. General Services Admin., 509 F.2d 527, 529 (D.C. Cir. 1974). *But cf. Chamber of Commerce v. Legal Aid Society*, 423 U.S. 1309 (1975) (Douglas, J., denying motion for a stay).

[81] See n.21 *supra*.

[82] Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); EEOC v. AT&T, Civ. Nos. 76-2217, 76-2281, 76-2285 (3d Cir. filed April 22, 1977), 45 U.S.L.W. 2508 (1977), petition for cert. filed 45 U.S.L.W. (1977).

[83] *Compare* H. Rep. No. 92-238, 92d Cong. 2d Sess., reprinted in U.S. Code Cong. & Ad. News, 2137, 2150 (1972) (suggesting the transfer of OFCC to EEOC) *with* the final version of the 1972 amendments to Title VII, Pub. L. 92-261, 86 Stat. 104.

filed with JRC must therefore fall within § 709(e) is no more persuasive. The JRC is a consequence of the 1972 amendments to Title VII which established the Equal Employment Opportunity Coordinating Council, 42 U.S.C. § 2000e-14. The Coordinating Council is responsible for, among other things, implementing inter-agency agreements to eliminate duplication among the operations, functions and jurisdictions of various federal agencies enforcing federal antidiscrimination employment policies. JRC was organized by the Coordinating Council to streamline the collection of employment discrimination information and to distribute it, without the necessity for multiple filings, to the separate agencies involved.[84] It is clear that JRC is the agent of several enforcement authorities. Nevertheless, nothing in 42 U.S.C. § 2000e-14 or in the implementing regulations which created JRC suggests an intention to extend the applicability of § 709(e) to federal employees outside EEOC or to information possessed by other agencies on their own authority.

Even assuming the applicability of § 709(e) to DSA, we are no more persuaded that a private cause of action can be implied from this criminal statute than from § 1905. The same reasons for our rejection of a private cause of action implied from § 1905 apply to § 709(e), and we will not repeat them. Chrysler's argument for a right to a trial *de novo* based on § 709(e) of Title VII is rejected.

3. 44 U.S.C. § 3508

Section 423 of the Federal Reports Act of 1942,[85] now codified as 44 U.S.C. § 3508 [86] provides:

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[84] *See, e.g.*, 41 C.F.R. 60-40.4.

[85] Pub. L. 77-831, ch. 811, § 4, 56 Stat. 1079. This act was designed to minimize the burden and expense to citizens of complying with multiple government requests for information and to eliminate unnecessary duplication of reporting requirements. *See* 88 Cong. Rec. 9165 (Nov. 27, 1942).

[86] Pub. L. 90-620, 82 Stat. 1304.

(a) If information obtained in confidence by a Federal agency is released by that agency to another Federal agency, all the provisions of law including penalties which relate to the unlawful disclosure of information apply to the officers and employees of the agency to which information is released to the same extent and in the same manner as the provisions apply to the officers and employees of the agency which originally obtained the information. The officers and employees of the agency to which the information is released, in addition, shall be subject to the same provisions of law, including penalties, relating to the unlawful disclosure of information as if the information had been collected directly by that agency.

(b) Information obtained by a Federal agency from a person under this chapter may be released to another Federal agency only—

(1) in the form of statistical totals or summaries; or

(2) if the information as supplied by persons to a Federal agency had not, at the time of collection, been declared by that agency or by a superior authority to be confidential; or

(3) when the persons supplying the information consent to the release of it to a second agency by the agency to which the information was originally supplied; or

(4) when the Federal agency to which another Federal agency releases the information has authority to collect the information itself and the authority is supported by legal provision for criminal penalties against persons failing to supply the information.

Chrysler argues that by virtue of the second sentence in § 3508(a) the employees of DSA are subject to the criminal provisions of § 709(e) of Title VII, even though that criminal statute would otherwise be applicable only to EEOC employees. This argument, however, assumes that DSA obtained the information in question from EEOC. Clearly that is not the case with respect to the AAP's, the CIR's, or the CRR's. Though DSA and EEOC both obtain Chrysler's EEO-1 reports from the JRC, in the preceding subsection we rejected Chrysler's contention that the JRC is an alter ego of EEOC, rather than a collection agent of both EEOC and OFCC. Since DSA did not obtain the EEO-1 reports from EEOC, but instead, obtained this information on its own behalf in the first instance, § 3508(a) does not apply. *Sears, Roebuck & Co. v. GSA*, 509 F.2d 527, 529 (D.C. Cir. 1974). Nor may Chrysler argue that the provisions of § 3508(b) prohibit DSA from publicly disclosing the contested documents, since this subsection only governs inter-agency transfers of information, and is not applicable to agency decisions to disclose information to the general public.

We hold that § 3508 is entirely inapplicable to the case before us. Whether this statute, which contains no sanctions, would support an implied private cause of action to prevent inter-agency transfers of information in violation of its terms is a question of some difficulty, which we do not here decide.

C. *The Administrative Procedure Act*

The government first took the position that there could be no judicial review, on behalf of a submitter, of an agency decision to release information requested by third parties under the FOIA. It now concedes that judicial review pursuant to the Administrative Procedure Act (APA) is available because a submitter may be "[a] person suffering legal wrong because of agency action . . . within the meaning of a relevant statute."[87] In light of that con-

[87] 5 U.S.C. § 702 (1970). See text following n.4 *supra*.

cession there is no need to expound at length on the reasons why we agree with those courts which have held that the APA provide a cause of action for enjoining an agency from disclosing submitter-generated information.[88] The district court rejected the government's first position and held that judicial review was available under the APA. But while we agree with that ruling we have some difficulties with its application in this case.

Our first difficulty is with the district court's holding that DSA, in its decision to disclose the manning tables, which the court viewed as confidential data, was acting in violation of its own regulations, 29 C.F.R. § 70.21(a),[89] and thus "not in accordance with law."[90] Although 29 C.F.R. § 70.21(a) is modeled after the criminal disclosure prohibitions in 18 U.S.C. § 1905,[91] it, like § 1905, only prohibits disclosures "not authorized by law." Since we have held that any disclosures pursuant to the OFCC disclosure regulations are authorized by law, the prohibitions in 29 C.F.R. § 70.21(a) are not applicable to this case.

Our second difficulty with the decision concerns the proper scope of judicial review under the APA. In reaching its decision the district court held a trial *de novo* on the merits of Chrysler's assertions and relied heavily on the trial testimony of Chrysler's witnesses in reaching the determination that the manning tables constituted confidential data which DSA could not disclose. Judicial review under the APA ordinarily is limited to a "review of the

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[88] *See, e.g.*, Charles River Park "A", Inc., *supra*, 519 F.2d at 941 n.6; Pennzoil Co. v. F.P.C., *supra*, 534 F.2d at 631-32 (5th Cir. 1974); GTE Sylvania, Inc. v. Consumer Product Safety Commission, 404 F. Supp. 352, 366-67 (D. Del. 1975).

[89] See n.36 *supra* for text.

[90] 5 U.S.C. § 706(2)(A) (1970).

[91] *Compare* 18 U.S.C. § 1905, *supra* at n.44, *with* 29 C.F.R. § 70.21(a), *supra* at n. 36.

whole [agency] record or parts of it cited by a party."[92] That rule is not inflexible, for certainly evidence may be taken in connection with an application under 5 U.S.C. § 705 for relief pending review. Moreover, the Supreme Court has approved *de novo* rather than agency record review (a) when the agency's action is either adjudicatory in nature and its factfinding procedures are inadequate, or (b) when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.[93] In this case, however, the district court relied on the testimony of trial witnesses not merely to decide the question of relief pending review, but also to decide the substantive merits. And in reaching the merits the court did not address the question whether an agency disclosure decision pursuant to the FOIA or agency disclosure regulations was adjudicatory, and if so, whether the agency's procedures on which the disclosure decision was based were adequate.[94]

Chrysler, relying on *Sears, Roebuck & Co. v. General Services Administration*, Civ. No. 75-2121, Slip Op. at 4-5 (D.C. Cir. filed April 1, 1977), urges that regardless of the judicial review provisions of the Administrative Procedure Act the Declaratory Judgment Act, 28 U.S.C. § 2201, provides separate authority for the district court to hold a *de novo* hearing. That argument, however, would be equally applicable to every agency review case, and the Declaratory Judgment Act so construed would eliminate the effect of the later enacted Administrative Procedure Act. The Supreme Court stated in *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 246 (1952), that "the declara-

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[92] 5 U.S.C. § 706 (1970).

[93] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

[94] Neither party contends that the district court was presented with any issues not before DSA.

tory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review." To construe the Declaratory Judgment Act to permit a federal court to conduct a trial *de novo* in reverse FOIA cases would transfer primary decisional responsibility for agency disclosures from the administrative agencies to the federal courts. We think the construction which Congress intended is that the scope of judicial review provisions of the Administrative Procedure Act apply in declaratory judgment actions.

It seems to us that in reverse FOIA cases under the APA a reviewing court should make the following analysis. First it should inquire whether any non-disclosure statute or non-disclosure regulation is applicable. If so, the court must conclude that the agency has acted outside the scope of its statutory authority, and should enjoin disclosure. If no non-disclosure statute or regulation applies, the court must then determine under what authority the agency intends to disclose the contested information. If the agency has concluded that the contested information does not fall within any FOIA exemption, thus mandating disclosure, the court must examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions. If, however, the agency has concluded (a) that the contested information does fall within a FOIA exemption but (b) public disclosure is, nevertheless, both desirable and permissible under the agency's own disclosure regulations, the court must undertake a two-step analysis. It must first examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions and, if so, then examine whether the agency considered the proper factors in determining that disclosure was permitted under its own disclosure regulations. Under the OFCC disclosure regulations, for ex-

ample, the contested information in this case could only be disclosed if that agency determined that disclosure would "further the public interest and [not] impede the discharge of any of the functions of the OFCC or the Compliance Agencies."[95] And, as the FOIA exemptions make clear, disclosure of certain types of information will not, in the opinion of Congress, always be in the public interest. Finally, if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the above analysis, the remedy is not a trial *de novo*, but a remand to the agency for an additional record or explanation for its decision.[96] Interim relief can, of course, be ordered on the authority of 5 U.S.C. § 705.

Applying the foregoing principles to this case, we conclude that this is an instance in which a remand to the agency is appropriate. The agency record is so ambiguous that it is impossible to determine whether the decision of DSA to disclose the contested information was based on a determination that disclosure is mandated by the FOIA, or is in the public interest and thus permissible under that agency's own disclosure regulations. Even if the agency record clearly revealed that the disclosure decision was based on a determination that disclosure was mandated by the FOIA, a remand would still be necessary, as the record does not sufficiently disclose the basis for the agency determination that the FOIA exemptions are inapplicable. Nor would the result be any different if the record revealed

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[95] 41 C.F.R. § 60-40.3(a), see n.19 *supra* for text; *id.* at § 60-40.2(a).

[96] *See* Camp v. Pitts, 411 U.S. 138, 142-43 (1973). We recognize that under Camp v. Pitts, *supra*, testimony or affidavits from the administrator setting forth the reasons for the decision made on agency record may sometimes be appropriate. No such testimony or affidavits were tendered in this case. Here we think a remand to the agency is appropriate for the reasons set forth in the text.

that disclosure was pursuant to the agency's own regulations, as the record does not state that, or why, such disclosure would be in the public interest.

Our decision to remand this case is based solely on the inadequacy of the administrative record under review. The government has urged that the district court should not have, and we should not now, reach the merits of the challenge to the actions of DSA because of Chrysler's failure to exhaust an administrative review remedy available in OFCC. We reject this contention. Judicial review of agency action must be available at a meaningful time considering the nature of the alleged injury to the petitioner for review. As DSA announced in its letters, it considers the FOIA 10 day time limit for action on requests for non-exempt FOIA information, 5 U.S.C. § 552(a)(6)(A)(i), binding on it regardless of the pendency of an administrative review proceeding. Since disclosure would render moot any judicial review, the nature of the subject matter demands that the action of DSA be regarded as the final agency action to which such review is directed. The administrative appeal to which the government refers is a creature of regulation, 41 C.F.R. § 60-60.4(d),[97] and the availability of that remedy cannot be permitted to destroy the subject matter of a proceeding seeking judicial review. If there were no pending FOIA requests, and Chrysler were seeking an advance determination that some of the contested information should be withheld from the public it would be appropriate to require exhaustion of a § 60-60.4(d) review in OFCC. But this case is not in that posture. The district court properly considered both the requests for interim relief and the merits of the claim for judicial review.

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[97] See n.27 *supra*.

D. *Chrysler's Due Process Claims*

Chrysler contends that it was denied due process of law in the agency proceedings which led to the DSA decision to disclose the contested documents. To the extent that Chrysler's due process claims are procedural we hold that, in light of the interests involved, OFCC disclosure regulation 41 C.F.R. § 60-60.4(d),[98] coupled with the process of administrative and judicial review set out above in Part IVC, meet fifth amendment due process standards. Any claim to substantive due process protection of "property" interests in information in the hands of the government is at this stage and on this record too speculative for our consideration. Since the Supreme Court's decisions in *Goldstein* v. *California*, 412 U.S. 546 (1973) and *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974), there is considerable doubt as to what law, state or federal, and if state law, what state's law, should be looked to for such a "property" interest. The government urges that whether or not there is some proprietary interest in the disputed information, that interest is waived by any contractor doing business with the government. There is no need for us to endorse that position, which would require far more knowledge about government contracting statutes than has been furnished to us by the parties in this case. We do note that Chrysler has suggested no proprietary interest which would be broader than the categories made exempt from disclosure by 41 C.F.R. § 60-40.3(a).[99] Until we are faced with a final decision to release such information we need not consider any substantive due process contentions.

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[98] *Id.*

[99] See n.19 *supra*.

V

Conclusion

The judgment of the district court shall be vacated and the case remanded to the district court for entry of an order that DSA conduct further proceedings consistent with this opinion. The district court should retain jurisdiction pending such further proceedings, and may consider the entry of an appropriate protective order until their completion. Pending the entry of the district court's order pursuant to the mandate of this court the extant stay order shall continue in effect. The appellant and appellees shall each bear their own costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

No. 75-159

Chrysler Corporation, *Plaintiff*,

v.

James R. Schlesinger, et al., *Defendants*.

Opinion

Layton, Senior District Judge.

Plaintiff, Chrysler Corporation, is engaged, *inter alia*, in the manufacturing of automobiles, air conditioning and heating equipment and chemical and metal products. Plaintiff transacts business throughout the United States. A portion of Plaintiff's business is comprised of contracts and subcontracts with the United States and its agencies.

Executive Order 11246, as amended 3 C.F.R. E.O. 11246, requires that government contractors refrain from discriminatory employment practices. Section 202 of the Executive Order requires that all large government contracts contain seven specific paragraphs set forth in that section. Plaintiff's contract with the Government contains the required language.

The fourth of the numbered paragraphs set forth in section 202 requires that the contractor comply with all provisions of Executive Order 11246 and of the rules, regulations and relevant orders of the Secretary of Labor. The Secretary of Labor has promulgated regulations pursuant to section 201 of the Executive Order which are found at 41 C.F.R. § 60-1.1 *et seq.*

Executive Order 11246, as amended, and the regulations promulgated thereunder require government contractors to submit equal opportunity reports and programs to the Of-

fice of Federal Contract Compliance ("OFCC") or the Department of Labor and various OFCC compliance agencies, including the Defense Supply Agency ("DSA"). 3 C.F.R. E.O. 11246, § 203; 41 C.F.R. §§ 60-1.2 and 60-1.6. Failure of a government contractor to comply with the Executive Order and the regulations can result in the cancellation of existing contracts and debarment of the contractor from future contract awards. 3 C.F.R. E.O. 11246, § 209.

The DSA has acted as the compliance agency for Plaintiff. Pursuant to the Executive Order and the regulations, which have been incorporated into Plaintiff's contract with the Government, Plaintiff has been required to file the Standard Form 100 ("EEO-1") with the Joint Reporting Committee ("JRC") which collects the form for the DSA. A separate form must be filed for each of Plaintiff's domestic facilities and a separate one for Plaintiff's entire corporate domestic operation. 41 C.F.R. § 60-1.7; Stip. par. 3.

The EEO-1's prepared and filed by Plaintiff contain statistical information with respect to the total number of persons employed, and the number of minority and female persons employed, by Plaintiff in nine general job categories. Stip. par. 3.

Plaintiff has also been required, pursuant to the regulations incorporated into its contract with the Government, to prepare Affirmative Action Plans ("AAP's") for its entire corporate domestic operation and separately for each of its individual domestic facilities. 41 C.F.R. § 60-1.40; Stip. par. 4. In its AAP's, Plaintiff is required to include a great deal of detailed employment information, both statistical and narrative in nature, concerning Plaintiff's total, and minority and female, employment for each of Plaintiff's specific, internally used job classifications. 41 C.F.R. § 60-1.40(a); Stip. par. 4. In this respect each of Plaintiff's AAP's includes information on staffing patterns, pay scales, actual and expected shifts in employment, promotions, seniority and related job matters. Plaintiff's AAP's are also required

to include forecasts of future employment; to set out goals, time tables and future projections for the employment, promotion and utilization of minorities and females; and to include an analysis of Plaintiff's success in meeting such goals. 41 C.F.R. § 60-1.40(b); Stip. par. 5..

Plaintiff is not required regularly to file its AAP's with the DSA, but the DSA regularly conducts "compliance reviews," pursuant to 41 C..F.R. §§ 60-1.20 and 60-60.3, to determine whether Plaintiff is in compliance with the Executive Order and the regulations promulgated thereunder. During the course of such compliance reviews, which consists of an examination of Plaintiff's affirmative action documents and also an on-site examination of Plaintiff's facilities, Plaintiff is required, pursuant to the regulations incorporated into its contract with the Government, to submit pertinent AAP's for its domestic facilities. 41 C.F.R. §§ 60-1.40(c) and 60-60.3(a); Stip. par. 5.

At the conclusion of a compliance review of one of Plaintiff's facilities, the Government's compliance review officer prepares a compliance review report ("CRR"). 41 C.F.R. § 60-60.3. The report includes information submitted to him by Plaintiff, analyzes Plaintiff's compliance with the Executive Order and the regulations, and contains recommendations to the regional office of the DSA on action which should be taken against Plaintiff and the corrective measures which Plaintiff should be required to implement. 41 C.F.R. §§ 60-1.7 and 60-60.3; Stip. par. 5.

The DSA also administers regulations, applicable to Plaintiff pursuant to the contractual agreement, which provide for the filing of complaints alleging violations of Executive Order 11246 and for the investigation and resolution of such complaints. 41 C.F.R. § 60-1.24. These complaints may be filed by job applicants and employees of a government contractor. 41 C.F.R. § 60-1.21.

In investigating a complaint, the DSA generally requests copies of, and reviews, the Plaintiff's AAP's, EEO-1's and related supporting material. Stip. par. 6. DSA is required to file a complaint investigation report ("CIR") with OFCC within sixty days of receipt of the complaint. 41 C.F.R. § 60-1.24(d).

On May 14, 1975, DSA notified Plaintiff by telephone that DSA had received a request for the public disclosure of the 1974 AAP and the report of an October, 1974, complaint investigation for Plaintiff's Newark, Delaware, assembly plant. Stip. par. 9.

By letter dated May 23, 1975, Plaintiff objected to the proposed disclosure of the AAP and the CIR for the Newark, Delaware, plant. Stip. par. 10.

On May 30, 1975, DSA notified Plaintiff by telephone that DSA would disclose the documents on June 4, 1975. Stip. par. 11.

On July 1, 1975, DSA notified Plaintiff by telephone that it had received a request for the public disclosure of the AAP's and CRR's for the Plaintiff's Hamtramck, Michigan, facility. Stip. par. 12.[1]

By letters dated July 3, 1975, and July 11, 1975, Plaintiff objected to the proposed disclosure of the documents relating to its Hamtramck, Michigan, facility. Stip. par. 13.

By letter dated July 18, 1975, DSA notified the Plaintiff that DSA would disclose the documents on July 25, 1975. Stip. par. 14.

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[1] In its Second Amended Verified Complaint, Plaintiff alleged that the Government intends to disclose an EEO-1 submitted by Plaintiff. The administrative records of the Government's decisions to disclose do not indicate this. Nor did Plaintiff show the Court that an EEO-1 had been attached to any of the documents that the Government intends to disclose. This being so, the Court finds that the Plaintiff has failed to prove that the Government intends to disclose an EEO-1.

In response to the threatened disclosures, Plaintiff has filed a complaint in this Court seeking declaratory and injunctive relief. This Court issued a preliminary injunction against the threatened disclosures.

Jurisdiction

A factual hearing was held over the Government's objection that the Court lacked subject matter jurisdiction of the case. The Court reserved its decision on this issue until a decision on the merits could be rendered.

The complaint contains three numbered counts: 1) that 41 C.F.R. § 60-40.1 *et seq.*, 29 C.F.R. § 70.1 *et seq.*, and 5 U.S.C. § 552 violate Plaintiff's right to due process of law because they do not require predisclosure notice and hearing;[2] 2) that the threatened disclosure is an unlawful abuse of agency discretion and that the Secretary of Labor has exceeded his authority in issuing the regulations upon which the disclosure is based because the threatened disclosures and regulations are in conflict with 42 U.S.C. § 2000e-8(e), 44 U.S.C. § 3508 and 18 U.S.C. § 1905;[3] 3) that the threatened disclosure is an unlawful abuse of agency discretion as the disclosure violates 41 C.F.R. § 60-40.3 and 29 C.F.R. §§ 70.21, 70.22, 70.24 and 70.31.[4]

The Court holds that it has jurisdiction of the case under 28 U.S.C. § 1331 and that the case arises in part under the Fifth Amendment to the United States Constitution.[5] *Bell*

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[2] Plaintiff's Count III, Second Amended Verified Complaint.

[3] Plaintiff's Count I, Second Amended Verified Complaint.

[4] Plaintiff's Count II, Second Amended Verified Complaint.

[5] ". . . And a cause of action may be supported by two or more grounds, and if one ground involves a substantial federal question that is sufficient to give the federal court jurisdiction to decide the merits of the entire cause of action, even though the federal claim is not sustained, ..." 1 Moore's Federal Practice, ¶ 0.60 [8.-3], P. 634.

v. Hood, 327 U.S. 678, 680-83, 66 S.Ct. 773, 774-775, 90 L.Ed. 939, 942-43 (1946). Having so decided, the Court further holds that the Court may conduct a review, under 5 U.S.C. § 701 *et seq.*, of the agency's decision to disclose. While 5 U.S.C. § 702 is not considered a jurisdiction-granting statute in the Third Circuit, the Court has jurisdiction of the case under 28 U.S.C. § 1331, which provides the independent basis of jurisdiction required by *Bachowski v. Brennan*, 502 F.2d 79, 82 (3rd Cir. 1974), rev'd on other grounds, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975).

Public Disclosure of Information By An Agency

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, divides the information within the Government's control into two kinds: 1) information which must be disclosed upon request and 2) information which may or must be withheld from a requestor. *Charles River Park "A", Inc. v. HUD*, 171 U.S.App.D.C. 286, 519 F.2d 935, 942 (1975).

The FOIA requires the Plaintiff in this "reverse" Freedom of Information case to prove that the information requested is not in the category of information which must be disclosed upon request. To do this, Plaintiff must prove that the information sought by the requestor is within one of the nine categories of information excepted from mandatory disclosure in 5 U.S.C. § 552(b).* *Sears, Roebuck & Co. v. GSA*, 402 F.Supp. 378, 383 (D.D.C.1975).

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*5 U.S.C. § 552(b):

"This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of any agency;

The Plaintiff has failed to prove that any category other than 5 U.S.C. § 552(b)(4) is applicable to any of the requested information. Further, Plaintiff has failed to prove that 5 U.S.C. § 552(b)(4) is applicable to any information other than the manning tables contained in the AAP's and CRR's.

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(3) specifically exempt from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregated portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this section."

At the evidentiary hearing, Plaintiff placed a copy of an AAP (Px-1) and a CRR (Px-4) in evidence and called four principal witnesses: Mr. Harris, Plaintiff's "Manager of personnel administration at the corporate level"; Mr. Dussey, Plaintiff's "manager of personnel research"; Mr. Kerr, Plaintiff's "assistant corporate controller"; and Dr. Plotkin, a "senior economist" employed by Arthur D. Little, Inc., an accounting firm.

Most of the evidence presented by the Plaintiff related to an AAP for the Newark, Delaware, facility (Px-1). Harris testified that the the AAP contains "manning" tables for each subdepartment of the facility. (Tr. 31). The manning table are lists of the Plaintiff's internally used job titles and the number of people who perform each job. (Tr. 29). The number of people who perform the job is known as the "population," and the population is broken down by sex and race. (Tr. 29).

Similar manning tables can be found in the CRR, Px-4. Thus, much of the evidence introduced to explain the importance of the AAP to Plaintiff applies with equal force to the CRR.

Plaintiff has contended, and proved to the satisfaction of the Court, that the manning tables contained in the AAP and CRR are confidential commercial information within the meaning of 5 U.S.C. § 552(b)(4). In order to be so, the information must be: 1) confidential and 2) such that release could cause Plaintiff substantial competitive harm. *National Park & Conservation Assn. v. Morton,* 162 U.S. App.D.C. 223, 498 F.2d 765, 770 (1974).

The testimony clearly shows that the manning tables are confidential. Harris and Dussey testified that the AAP's prepared by Plaintiff have not been released to anyone. (Tr. 57, 74-75). Dussey testified that manning tables have never been disclosed and that a job classification's population has never been disclosed. (Tr. 103). Plotkin testified that personnel data similar to the manning tables is not available elsewhere (Tr. 227), and the Government failed to show the contrary.

The record also establishes that the release of the manning tables could cause Plaintiff substantial competitive harm in several different ways. First, the possession of such a document could aid another corporation in its practice of employee raiding, a practice not unknown in the automobile industry. (Tr. 41). The manning tables, with their race and sex breakdown, would aid a potential employer in identifying a Chrysler employee with just the skills, race and sex it needs. (Tr. 45-47). Employee raiding is particularly helpful in meeting minority and female hiring goals and requirements. (Tr. 42-43). Losses of such employees are expensive to the Plaintiff because they distract employees from their jobs and the loss of an employee means the loss of the funds spent training him. (Tr. 43-44).

Second, the possession of a manning table would permit a competitor to determine the exact use of Plaintiff's labor force, and thus the technology being applied by Plaintiff. Plotkin demonstrated this by diagraming Plaintiff's Newark, Delaware, facility based solely upon the information contained in the manning tables. His diagram was introduced into evidence as Px-9. Such a diagram would be useful in comparative analysis and would alert competitors to areas worth their managerial time. (Tr. 162-63; Tr. II 27).

Third, the possession of manning tables produced over several years would allow Plaintiff's competitors to reduce their risk taking. (Tr. II 54-55). All automobile manufacturers purchase machinery from the same producers. (Tr. II 52-55). Allowing Plaintiff to buy newly designed equipment and waiting to see the changes in employee utilization reflected in the different years' manning tables would allow the competitor to determine whether the machinery decreases or increases labor costs. (Tr. II 55-56). After reading Plaintiff's test results from the manning tables, the

competitor would know whether or not the new equipment was a good investment.

Having found that the manning tables contained in the AAP's and CRR's are exempt from mandatory disclosure,[7] they are found to be of the second type of information created by the FOIA, information which may or must be withheld. Information of this type is not controlled by the FOIA, but by regulations promulgated under 5 U.S.C. § 301.[8] *Charles River Park "A", Inc.*, 519 F.2d at 942.

5 U.S.C. § 301 is the general statute providing for the promulgation of regulations for the use and custody of government records. Pursuant to this statute, the Secretary of Labor promulgated 29 C.F.R. § 70.21(a)[9] which is applicable

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[7] Data similar to that found in EEO-1's can be found in the AAP's. This data is far less detailed than that found in the manning tables. The data is broken down into only nine general job categories. Plaintiff failed to meet its burden of proof to show that the release of such general data could cause substantial competitive harm. Therefore, this data is not within the 5 U.S.C. § 552b)(4) exemption to the general rule of mandatory disclosure.

[8] 5 U.S.C. § 301:

"The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

[9] 29 C.F.R. § 70.21(a):

"Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates

to DSA as a delegate of powers of the Department of Labor's OFCC. (*See*, 41 C.F.R. § 60-1.6).

29 C.F.R. § 70.21(a) forbids the agency to disclose information that would expose the disclosing employee to criminal liability under 18 U.S.C. § 1905.[10] That criminal statute makes it illegal for a government employee to disclose confidential statistical data submitted to the Government by a corporation.

The manning table contained in the AAP's and CRR's consist entirely of confidential commercial statistical data. All of the statistics were submitted by Plaintiff, a corporation. Therefore, an employee disclosing the manning tables contained in the AAP's and CRR's would face criminal liability under 18 U.S.C. § 1905. Such a disclosure is forbidden by 29 C.F.R. § 70.21(a).

The DSA's decision to disclose the manning tables violates 29 C.F.R. § 70.21(a). An agency which violates its

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to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law."

[10] 18 U.S.C. § 1905:

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

regulations is acting contrary to law, within the meaning of 5 U.S.C. § 706(2)(A),[11] and may be enjoined from so doing. *See, S.S. Logging Co., Inc. v. Barker,* 366 F.2d 617, 624 n. 6 (9th Cir. 1966); *Delaware v. Bender,* 370 F. Supp. 1193, 1203 (D.Del.1974). Therefore, the Court will enjoin the disclosure of the manning tables found in the AAP's and CRR's.

In light of the foregoing, it is not necessary to discuss the other regulations cited by Plaintiff in Count II of its complaint.

Nor is it necessary to discuss the alleged conflict between the Government's disclosure regulations and the statutes cited by Plaintiff in Count I of its complaint. From what has

[11] 5 U.S.C. § 706:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

been said above, it is clear that the regulations do not conflict with 18 U.S.C. § 1905. That section is fully incorporated into the Government's disclosure regulation 29 C.F.R. § 70.21(a). The other criminal statute cited by Plaintiff, 42 U.S.C. § 2000e-8(e) does not apply to this fact pattern for the reasons stated in *Sears, Roebuck & Co. v. GSA,* 166 U.S.App.D.C. 194, 509 F.2d 527 (1974).

Plaintiff's final claim is that the FOIA and the Government's disclosure regulations violate the Fifth Amendment to the United States Constitution because they do not require that Plaintiff be given notice of an FOIA request for disclosure of information submitted to the Government by Plaintiff and they do not require that Plaintiff be given a hearing prior to disclosure in response to such a request.

The Fifth Amendment requires that the Government grant notice and a hearing to a corporation before it deprives it of property. *Perry v. Sinderman,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Security Trust Co.* v. *Lexington,* 203 U.S. 323, 27 S.Ct. 87, 51 L.Ed. 204 (1906). 41 C.F.R. § 60-60.4(d) [12] provides for a hearing prior to the

[12] 41 C.F.R. § 60-60.4(d):

"*Public access to information.* Information obtained from a contractor under Subpart B will be subject to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552. Contractors should identify any information which they believe is not subject to disclosure under 5 U.S.C. 552 and should specify the reasons why such information is not disclosable. The Contract Compliance Office will consider the contractors claim and make a determination, within 10 days, as to whether the material in question is exempt from disclosure. The contract compliance officer will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal. However, during the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated within a reasonable time, all information obtained from a contractor under Subpart B except information disclosable under §§ 60-40.2 and 60-40.3 of this

public disclosure of information submitted by the Plaintiff. This regulation provides that the AAP's and the data which Plaintiff supplies for the CRR's may be claimed by the Plaintiff to be non-disclosable at the time they are submitted to DSA.[13] The regulation provides Plaintiff with the opportunity to specify why it believes the information to be non-disclosable and provides for a determination of Plaintiff's claims within ten days. It also allows Plaintiff ten days in which to appeal to the Director of OFCC and requires the Director to decide the appeal in ten days. The decision of the Director is a final agency decision reviewable under 5 U.S.C. § 701 *et seq.* Thus, the regulations grant Plaintiff a constitutionally adequate hearing.

The record shows that Plaintiff was in fact given a pre-disclosure hearing. Pursuant to 32 C.F.R. § 1285.7(b)(7),[14] Plaintiff was notified that an FOIA request to disclose information which Plaintiff had submitted had been received by the DSA. Plaintiff was given an opportunity to submit written objections to, and written arguments against, the public disclosure of the requested information. DSA decided to disclose the manning table, among other documents, and it is this decision which the Court has reviewed and found contrary to the agency's regulations.

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chapter is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 522 (b)(7), and such information obtained from a contractor under Subpart B shall be treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review."

[13] Plaintiff has argued that 41 C.F.R. § 60-60.4(d) does not provide for a claim of non-disclosability at the time of submission of information to the Government, but rather at the time an FOIA disclosure request is received. Such a reading of the regulation's language is possible. However, when 41 C.F.R. § 60-60.4(d) is read with the rest of the subpart, it becomes clear that the regulation is speaking of the time of submission of information. Further, Plaintiff's reading of 41 C.F.R. § 60-60.4(d) would place it in conflict with the time limitations found in 5 U.S.C. § 552(a)(6)(A).

In conclusion, the Court, having found that the disclosure of the manning tables contained in the AAP's and the CRR's is contrary to 29 C.F.R. § 70.21(a) and that the agency decision to disclose the manning tables is contrary to law, the Court will enter a permanent injunction against the disclosure of the manning tables.

What has been said herein shall constitute findings of fact and conclusions of law.

Parties will submit proposed orders in the light of this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-1970 and 76-2238

CHRYSLER CORPORATION, Appellant in No. 76-1970

vs.

JAMES A. SCHLESINGER, Secretary United States Department of Defense; LT. GEN. WALLACE ROBINSON, Director, Defense Supply Agency; PHILIP J. DAVIS, Director, Office of Federal Contract Compliance; and JOHN DUNLOP, Secretary United States Department of Labor, Appellants in No. 76-2238

(D.C. Civil No. 75-159)

ON APPEAL FROM THE UNITED DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present: VAN DUSEN, ADAMS and GIBBONS, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on June 13, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed June 17, 1976, be, and the same is hereby vacated and the cause remanded to the district court for entry of an order that the Defense Supply Agency conduct further proceedings consistent with the opinion of this Court. The district court should retain jurisdiction pending such further proceedings, and may consider the entry of an appropriate protective order until their completion. Pending the entry of the district court's order pursuant to

the mandate of this Court the extant stay orders, dated June 17, 1976 and July 1, 1976, shall continue in effect. Appellant and appellees shall each bear their own costs.

ATTEST:
THOMAS QUINN
Clerk

September 26, 1977

APPENDIX D

Statutes and Regulations

The Freedom of Information Act, 5 U.S.C. 552, as amended by Pub. L. 93-502, 88 Stat. 1562, and Pub. L. 94-409, 90 Stat. 1247, provides in pertinent part:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * *

* * * * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute

(other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withfield * * *;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * *

18 U.S.C. 1905 provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

The OFCCP disclosure regulations, 41 C.F.R. Part 60-40, provide in pertinent part:

5 U.S.C. § 301 provides:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution

and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

§ 60-40.1 Purpose and scope.

This part contains the general rules of the OFCC providing for public access to information from records of the OFCC or its various compliance agencies. These regulations implement 5 U.S.C. 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 CFR Part 70. It is the policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment. This part sets forth generally the categories of records accessible to the public, the types of records subject to prohibitions or restrictions on disclosure, and the places at which and the procedures whereby members of the public may obtain access to and inspect and copy information from records in the custody of the OFCC and the compliance agencies.

§ 60-40.2 Information available on request.

(a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCC or Compliance Agencies must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCC or the Compliance Agencies except as limited in 41 CFR 60-40.3(a)(1).

(2) Imposed plans and hometown plans, pending or approved.

(3) Text of final conciliation agreements.

(4) Validation studies of tests or other preemployment selection methods.

(5) Dates and times of scheduled compliance reviews.

§ 60-40.3 Information exempt from compulsory disclosure and which may be withheld.

(a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers if such disclosure would subject the named compliance officers to undue harrassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

(b) Other records may be withheld consistent with the Freedom of Information Act on a case-by-case basis, with the prior approval of the Director, OFCC.

§ 60-40.4 Information disclosure of which is prohibited by law.

The Standard Form 100 (EEO-1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709 (e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-159

CHRYSLER CORPORATION, *Plaintiff*,

v.

JAMES R. SCHLESINGER, ET AL. *Defendants*.

Memorandum

On April 20, 1976, the Court filed an opinion in this case and requested that the parties submit proposed orders. The orders have been filed and the Court has heard the parties' arguments in support of their proposals.

Despite the clarity of this Court's opinion defining "manning tables", Chrysler's counsel presented a proposed order designed to withhold from release to the public a substantial amount of material which obviously does not conform to the Court's definition of "manning tables." Plaintiff's arguments for the inclusion of this extra material was that it fell within Dr. Plotkin's definition of "manning tables" (Tr. 210-11). In other words, Chrysler is attempting to reargue the case under the guise of a definition of "manning tables" stated by a single witness. The Court is well aware of Dr. Plotkin's testimony and, in fact, adopted most of it. But it should be remembered that both Messrs. Harris and Dussey, Plaintiff's first two witnesses, defined "manning tables" (Tr. 26-31 and Tr. 73) in the narrow sense adopted by the Court. And also Mr. Kirk, Plaintiff's third witness, while he did not specifically define "manning tables", nevertheless, when asked to point out examples of material, the release of which would be harmful to Chrysler, cited information that could only come from "manning tables" as defined by Messrs. Harris and Dussey. (Tr. 198-99)

Dr. Plotkin concededly defined "manning tables" more broadly. But significantly in almost every case where asked to demonstrate where Plaintiff would suffer substantial completitive harm he cited from material drawn from the the "manning tables" as defined by the previous witnesses. Tr. II 21-27, 40-45 and 46-48. The Court's definition of "manning tables" at page 9, of its opinion will be adhered to.

In the Court's view, Chrysler will suffer no substantial competitive harm by the release of any of the material sought to be withheld from release except for those pages specifically referred to in the following order.

Order

It is ORDERED, ADJUDGED AND DECREED, this 17th day of June, 1976,

That the Defendants, their agents and employees are permanently enjoining and restrained from releasing or disclosing to the public by any means whatsoever the contents of the following documents as contained on the specific pages enumerated:

1. Affirmative Action Program, Chrysler Corporation, Newark Assembly Plant, Program Year 9-1-74 to 9-1-75, pages: 48, 51, 52, 56, 57, 58, 63, 64, 65, 66, 67, 68, 72, 73, 74, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 104, 105, 106, 107, and 112.

2. Affirmative Action Program, Hamtramck Assembly Plant, July 1, 1973 to January 1, 1975 with information updated to May 1, 1975, pages: 121 through 149, inclusive.

CALEB LAYTON

U.S.D.J.